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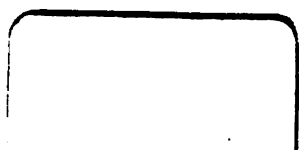
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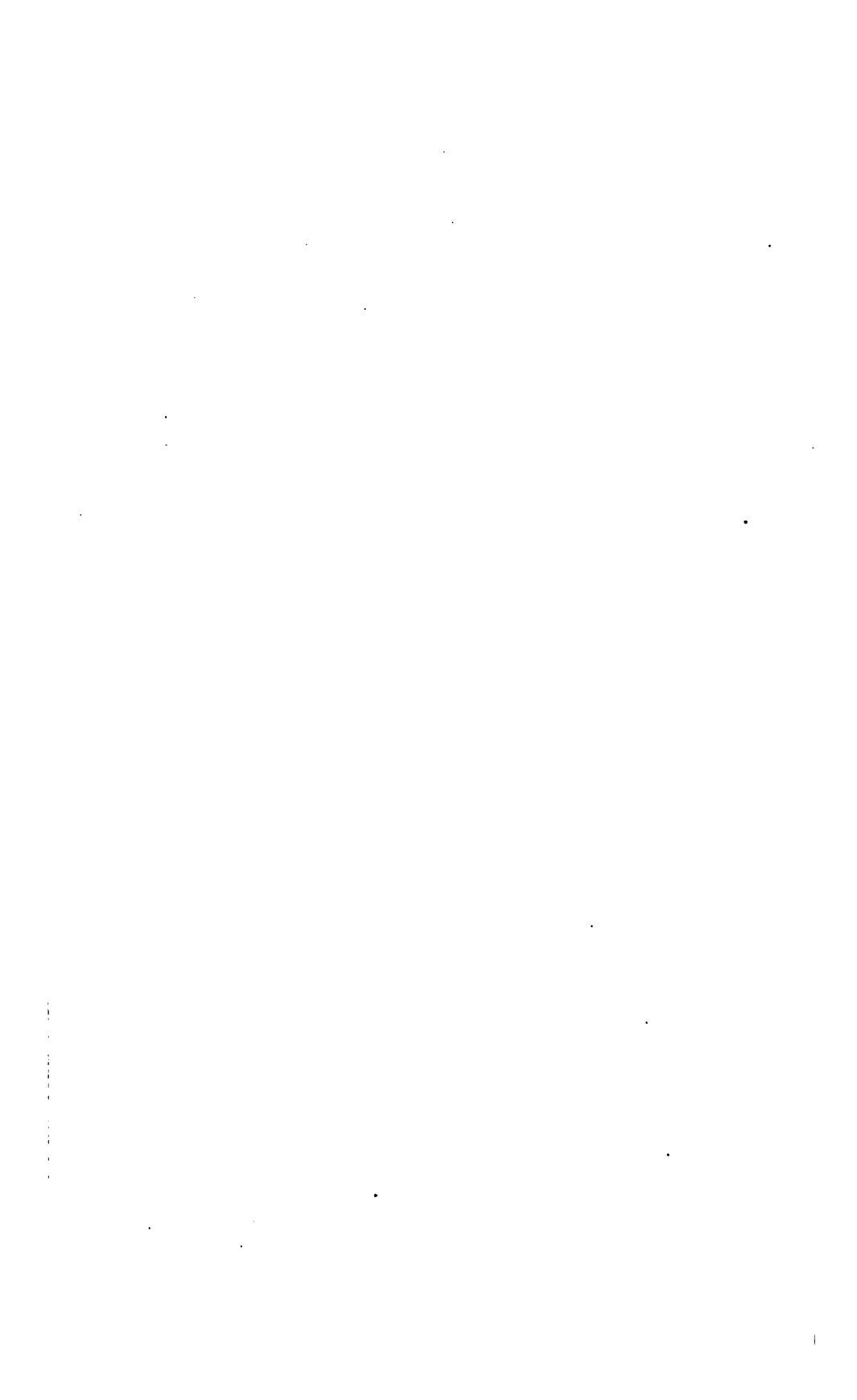
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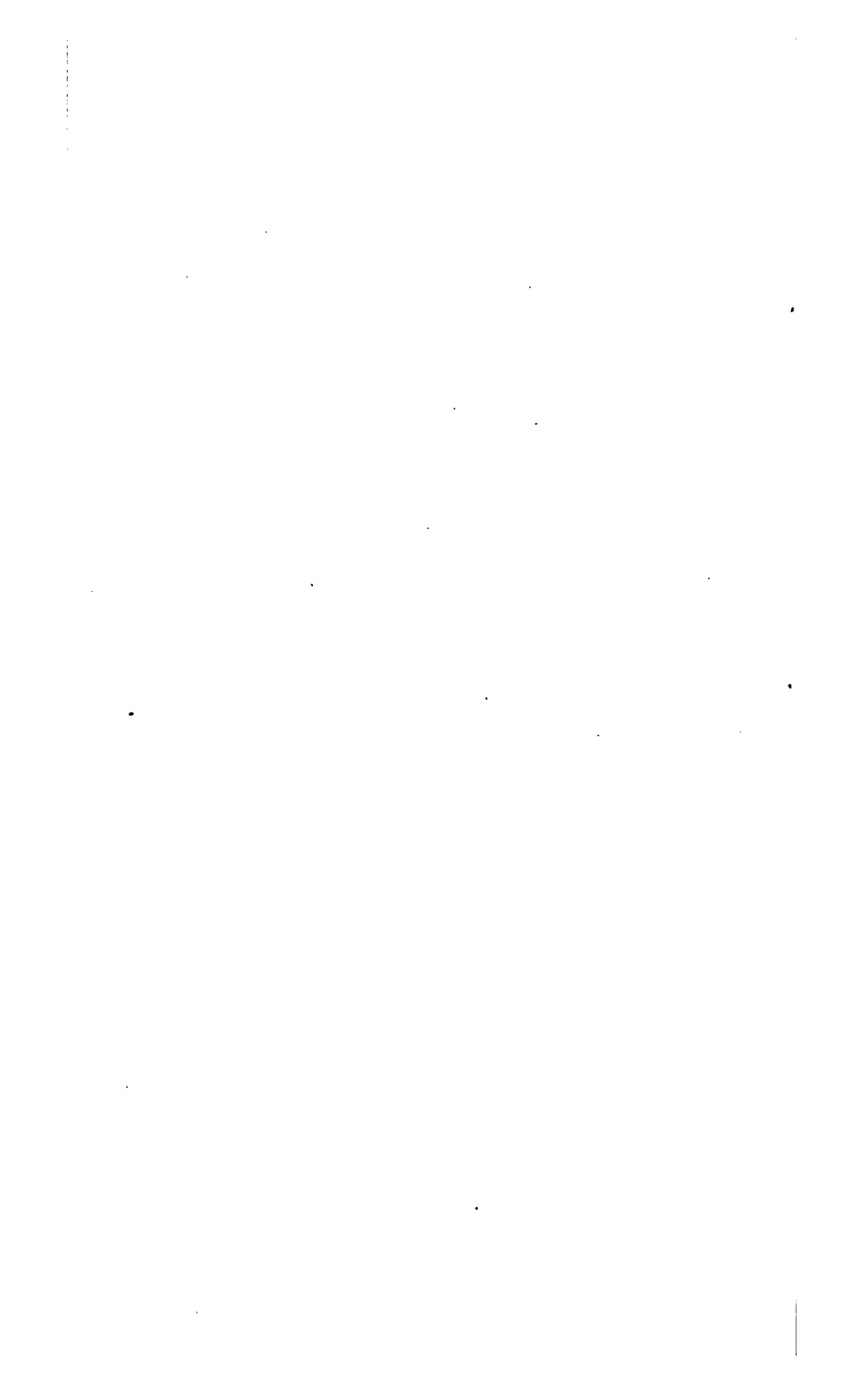
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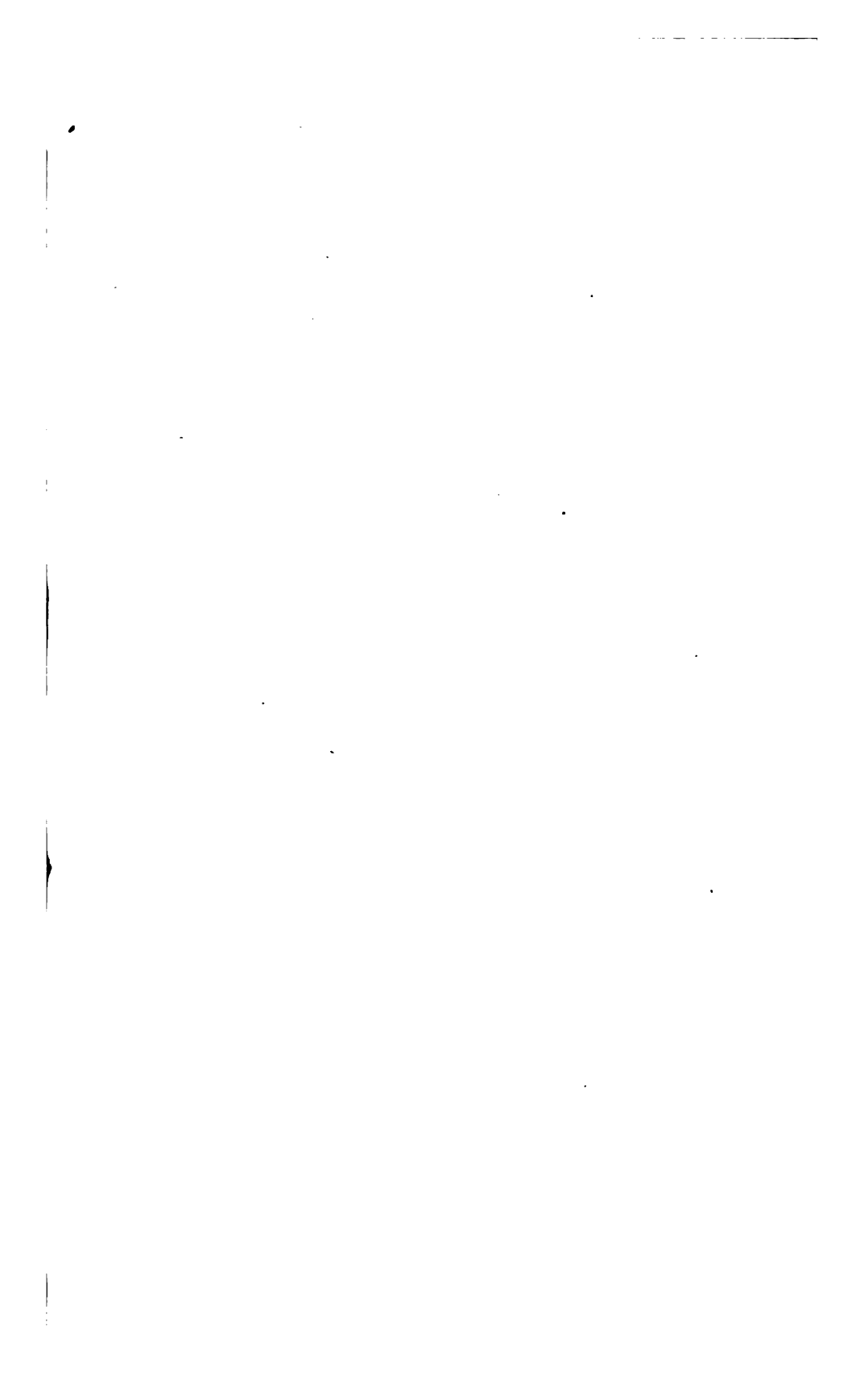
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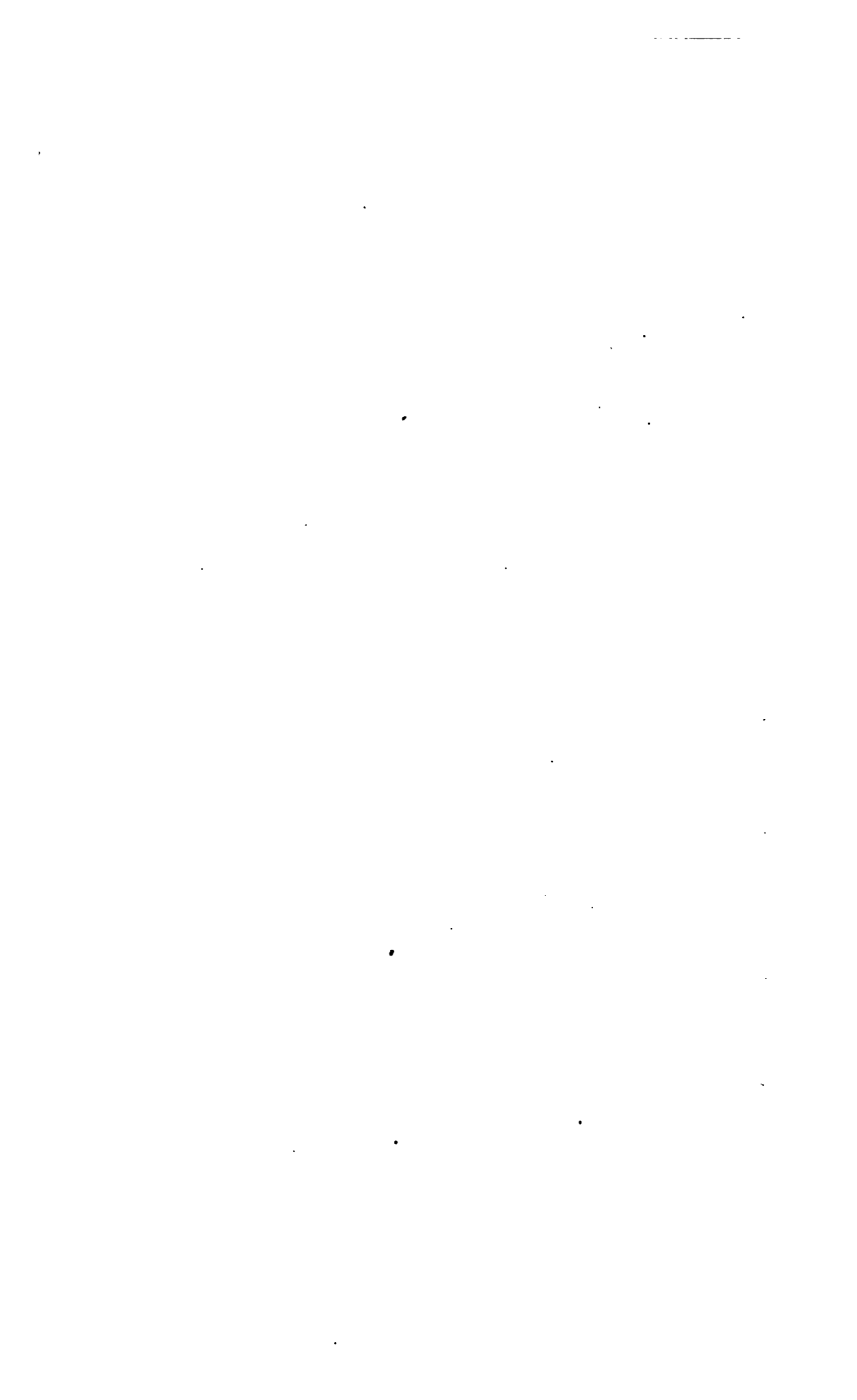












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CONTAINING
ALL DECISIONS OF GENERAL INTEREST
DECIDED IN
THE COURTS OF LAST RESORT
OF THE
SEVERAL STATES,
WITH
NOTES AND REFERENCES
BY
ISAAC GRANT THOMPSON.
VOL. XX

CONTAINING ALL CASES OF GENERAL IMPORTANCE IN THE FOLLOWING
REPORTS:

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* The hiatus in the Illinois Reports arises from the fact that the volumes between the 69th and the 75th have not yet been published.

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LIST OF JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME

ALABAMA.

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THOMAS PETERS, CHIEF JUSTICE. †
BENJAMINE F. SAFFOLD,
ROBERT C. BRICKNELL. ‡

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JOHN M. SCOTT, CHIEF JUSTICE. |
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WILLIAM K. McALLISTER,
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IOWA.

JAMES G. DAY, CHIEF JUSTICE. ¶
JAMES H. ROTHROCK,
JOSEPH M. BECK,
AUSTIN ADAMS,
WILLIAM H. SEEVERS.

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WILLIAM G. BARROWS,
CHARLES DANFORTH,
WILLIAM WIRT VIRGIN,
JOHN A. PETERS,
ARTEMAS LIBBEY.

* Resigned June, 1872.

† Chief Justice after June, 1872.

‡ Appointed to fill vacancy caused by resignation of Peck, C. J.

§ Chief Justice till June Term, 1873. | Chief Justice from June Term, 1873.

¶ Hon. Chester C. Cole was Chief Justice from Jan. 1, 1876, to Jan. 19, 1876 — a portion of the time covered by this volume. He then resigned, and Hon. Wm. H. Seever was appointed for the unexpired term, which ended Dec. 31, 1876.

LIST OF JUDGES.

MARYLAND.

JAMES LAWRENCE BARTOL, *Chief Justice*.

JAMES AUGUSTUS STEWART,
 JOHN MITCHELL ROBINSON,
 RICHARD GRASON,
 RICHARD HENRY ALVEY,
 OLIVER MILLER,
 RICHARD JOHNS BOWIE,
 GEORGE BRENT.

MASSACHUSETTS.

HORACE GRAY, *Chief Justice*.

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 JAMES D. COLT,
 SETH AMES,
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MICHIGAN.

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 CHARLES DOE,
 WILLIAM SPENCER LADD,
 JEREMIAH SMITH,||
 ISAAC WILLIAM SMITH.¶

EDMUND LAMBERT CUSHING, *Chief Justice*. **

WILLIAM SPENCER LADD,
 ISAAC WILLIAM SMITH.

* Died November 23, 1875.

‡ Chief Justice prior to January 1, 1873.

† Appointed December 31, 1875.

|| Resigned January 23, 1874.

‡ From January 1, 1876.

¶ Appointed vice Smith, resigned.

** In 1874 the legislature of New Hampshire abolished the Supreme Judicial Court and established in its stead the Superior Court, which was composed of three judges, and each judge who sat in a case at a law term, was required "to deliver his separate opinion, stating the grounds thereof, briefly." The decisions of the Superior Court began with the December Term, 1874. In case a judge of the Superior Court was disqualified to sit in a case, provision was made for calling in a circuit judge.

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NEW JERSEY.

THEODORE RUNYON, CHANCELLOR.

MERCEY BEASLEY, CHIEF JUSTICE.

VANCLEVE DALRIMPLE,

GEORGE S. WOODHULL,

DAVID A. DEPUE,

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W. W. UPTON, CHIEF JUSTICE. †

P. P. PRIM,

L. L. McARTHUR,

E. D. SHATTUCK, ‡

JOHN BURNETT. ‡

* Chief Justice from September, 1874. † Chief Justice from 1872 to Sept., 1874.

‡ From September, 1874.

LIST OF JUDGES.

WEST VIRGINIA.

A. F. HAYMOND, PRESIDENT.
JOHN S. HOFFMAN,
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JAMES PAULL.

WISCONSIN.

EDWARD G. RYAN, CHIEF JUSTICE.
ORSAMUS COLE,
WILLIAM P. LYON.

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CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

CHIPMAN v. TUCKER.

(38 Wis. 43.)

Negotiable instrument — delivery — right of bona fide holder.

A promissory note and a mortgage securing it were placed in the hands of R. to be delivered to the payee upon the happening of a certain event, and R., without authority, delivered them to the payee without waiting for such event. *Held*, that the maker was not liable on them even to a bona fide holder for value.

ACTION to foreclose a mortgage executed by the defendant Reuben Tucker and wife on June 25, 1857, to secure a promissory note, under seal, of said Tucker to the Ripon and Wolf River Railroad Company for \$1,000, bearing same date and payable in ten years from January, 1857.

Defense that there never had been a valid delivery of the note or mortgage. The facts are sufficiently stated in the opinion.

The defendants had judgment dismissing the complaints and the plaintiff appealed.

Felker & Weisbrod, for appellant, argued that the note was given with the intention that it should be thrown upon the market to raise money upon, and to pass from hand to hand by delivery, and was in every sense commercial paper (*Clark v. Janesville*, 10 Wis. 186, 188; *Bushnell v. Beloit*, id. 195; *Knox Co. v. Aspinwall*, 21 How. [U. S.] 539; 2 Hill, 177; 1 Stockt. Ch. 667-9; *Gelpcke v. Dubuque*, 1 Wall. 176-206; id. 83; 2 id. 283; *Blake v. Supervisors*, 61 Barb. 149; Edwards on Bills, 61, and cases there cited); that, as the uncontradicted evidence shows that plaintiff took the note and mortgage in payment of a debt, he was a holder for value (23 Wis. 21; 25 id. 144); and that the note was properly indorsed. *Crosby v. Roub*, 16 Wis. 616; *Bange v. Flint*, 25 id. 544.

Gabe Bouck, for respondent, to the point that the note, even in the hands of a *bona fide* holder, was invalid, because, never having been delivered by the maker, it had no legal inception, cited *Andrews v. Thayer*, 80 Wis. 228; *Walker v. Ebert*, 29 id. 194; S. C., 9 Am. Rep. 548; *Kellogg v. Steiner*, id. 626; *Tisher v. Beckwith*, 80 id. 55; *Everts v. Agnes*, 4 id. 348; *Wait v. Pomeroy*, 20 Mich. 425; S. C., 4 Am. Rep. 395; *Burson v. Huntington*, 21 id. 415; S. C., 4 Am. Rep. 497; *Whitney v. Snyder*, 2 Lans. 477; *Chapman v. Rose*, 44 How. Pr. 364; *Puffer v. Smith*, 57 Ill. 527; *Taylor v. Atchison*, 54 id. 196; S. C., 5 Am. Rep. 118; *Putnam v. Sullivan*, 4 Mass. 45; *Nance v. Lary*, 5 Ala. 370; *Edwards on Bills*, 323, 452, *et seq.*; *Clark v. Sisson*, 22 N. Y. 812; *Hamilton v. Vought*, 34 N. J. Law (5 Vroom), 187; *Munn v. The Commission Co.*, 15 Johns. 55; *Powell v. Waters*, 8 Cow. 669. He also contended, upon the evidence, that the Circuit Court properly found the plaintiff not to be a *bona fide* holder.

COLL, J. The undisputed evidence shows that the defendant executed the note and mortgage in suit, and placed them in the hands of Freeman M. Rowley, under an arrangement, or with the express understanding, that there was to be subsequently a meeting of the mortgagors, who might execute, or had executed, mortgages running to the railway company, at which meeting such mortgagors were to consider and determine whether or not they would deliver their respective obligations to the company in exchange for stock; but in no event were these securities to be delivered until this meeting was held and determination had. Freeman M. Rowley was not authorized to do any thing whatever with these securities, they being held by him as a mere custodian or depositary for safe-keeping. Rowley was at this time an indifferent person, though it appears that he was soon thereafter chosen a director of the company; and he was selected by all parties concerned in the arrangement as a suitable depositary of these securities until it was decided whether they should be delivered. It further appears that the mortgagors never had any meeting to determine the question of delivery, and that the defendant never, in fact, either himself delivered, or authorized Rowley to deliver, the note and mortgage to the company, but that they were delivered without his consent, knowledge or authority. These are undisputed facts in the case. The mortgage and note never having been delivered by the defendant, but having been surreptitiously put in circulation without his knowledge or consent, the single question is presented, whether they ever had any valid existence. The court below held that they were not valid obligations; and in this view we fully concur.

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There is no claim or pretense that the defendant was guilty of any negligence or want of diligence in depositing these securities with Rowley for safe-keeping. It appears that Rowley was an old resident of the place, and one of the leading merchants in business there at the time. He stood wholly indifferent between the company and the makers of these securities; and it would be unreasonable to impute negligence to the defendant because he did not suspect the fidelity or integrity of such a man, and deal with him as though he were already proven to be a knave. The question of negligence, therefore, being wholly out of the case, the further inquiry arises, whether, upon the undoubted facts, the note and mortgage ever had a legal existence or became valid obligations.

The doctrine is elementary, that delivery is an essential part or step in the making and execution of such instruments. In *Tisher v. Beckwith*, 30 Wis. 56; S. C., 11 Am. Rep. 546, it is said: "It is essential to the validity of a deed that it should be delivered, and such delivery, to be valid, must be voluntary, that is, made with the assent and in pursuance of the intention on the part of the grantor to deliver it; and if not so delivered, it conveys no title. A deed purloined or stolen from the grantor, or the possession of which was fraudulently or wrongfully obtained from him without his knowledge, consent or acquiescence, is no more effectual to pass title to the supposed grantee, than if it were a total forgery, and an instrument of the latter kind had been spread upon the record. The only question which can ever arise to defeat the title of the supposed grantor, in such cases, is, whether he was guilty of any negligence in having made, signed and acknowledged the instrument, and in suffering it to be kept or deposited in some place where he knew the party named as grantee might, if so disposed, readily and without trouble obtain such wrongful possession of it, and so be enabled to deceive and defraud innocent third persons." The same rule is recognized in *Andrews v. Thayer*, 30 Wis. 228, though the question of delivery was not the real point of the decision in the latter case. But that delivery is essential to the validity of a deed or mortgage is doubtless a doctrine so familiar and elementary as to dispense with the necessity of any reference to authority in its support. There having been no delivery of the note and mortgage, they never had a legal existence, or were never fully executed.

It is claimed, however, that, under the decision in this State, these securities stand upon the ground of commercial or negotiable paper, and that all the rules and usages in regard to such paper apply to them; and the plaintiff, being a *bona fide* holder for value, must be protected. Whether the plaintiff is an innocent holder for value is a question of some doubt upon the evidence; but we do not choose to consider it, nor

shall we place our decision upon the ground that he is not to be regarded in that light. The note or instrument accompanying the mortgage was under seal, payable to the order of the railroad company; and it and the mortgage were transferred by the bond of the company attached thereto, as in *Crosby v. Roub*, 16 Wis. 616. Assuming that the securities possess all the essential qualities of commercial paper, does this view aid the plaintiff? "As a general rule, a negotiable promissory note, like other written contracts, has no legal inception or valid existence as such, until it has been delivered in accordance with the purpose and intent of the parties." *Burson v. Huntington*, 21 Mich. 416, 431, 432; S. C., 4 Am. Rep. 497. In this case will be found an able and quite discriminating examination and discussion of the authorities bearing upon this question; and the conclusion reached by the court accords with sound principle. It is, that delivery of a promissory note by the maker is necessary to a valid inception of the contract, and that, until there is a delivery, the note has no vitality, and the rules of commercial paper have no application to it. And such, in substance, was the language of this court in *Walker v. Ebert*, 29 Wis. 194; S. C., 9 Am. Rep. 548, and *Kellogg v. Steiner*, id. 626, when considering the question as to the validity of a note to which the maker's signature has been procured through fraud, or where it was alleged that the paper was a forgery. "The inquiry in such cases," says Chief Justice Dixon, "goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is, to show that it is not in law or in fact what it purports to be, namely, the promissory note of the supposed maker. For the purpose of setting on foot or pursuing this inquiry, it is immaterial that the supposed instrument is negotiable in form, or that it may have passed to the hands of a *bona fide* holder for value. Negotiability in such cases presupposes the existence of the instrument as having been made by the party whose name is subscribed; for until it has been so made and has such actual legal existence, it is absurd to talk about a negotiation, or transfer, or *bona fide* holder of it, within the meaning of the law merchant." *Walker v. Ebert*, p. 197. These remarks are strictly applicable to the peculiar circumstances of this case. The defendant is sought to be held responsible on a contract which he never executed. True, he signed these papers; but he did not deliver them. He kept control of the securities as fully as though he had retained manual possession of them. The witness W. B. Falcker, who acted as agent of the company in the transaction of the business, testified that, "if sufficient funds were not raised by means of these mortgages.

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and the company could provide means otherwise to secure the completion of the road to Winneconne, the mortgagors still had their option whether they would deliver their mortgages to the company and take stock therefor, or whether they would retain them." The instruments never became operative by delivery, any more than though they had been stolen from the possession of the defendant and put in circulation. And to say that the rules and principles of law in regard to negotiable paper preclude the defendant from showing that the instruments were never delivered and consequently never had any legal existence, is, as it seems to us, to extend those rules and principles beyond their just application. *Bona fide* holders of commercial paper should be protected in all proper cases, but they are not the only parties who have rights which the courts are bound to respect.

Nor does the principle apply, that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. Rowley had no legal power or right to part with these securities by delivering them to the company. If he had purloined them from the possession of the defendant, and delivered them, the plaintiff's title would have been as good to them as it is now. For the instruments were never delivered, and were not intended to be delivered until further action had been taken, and remained wholly within the control of the defendant. See *Thomas v. Watkins*, 16 Wis. 550. But this whole field of discussion is so thoroughly gone over in *Burson v. Huntington*, *Walker v. Ebert*, *Kellogg v. Steiner*, and cases there referred to, that it is deemed unnecessary to make further remarks. See *Puffer v. Smith*, 57 Ill. 527; *Butler v. Carns*, 37 Wis. 61.

There having been no delivery of the note and mortgage, we think the court below was right in holding that they were not valid obligations against the defendant.

By the Court. — The judgment of the Circuit Court is affirmed.

NOTE.—The same rule was applied to similar facts in *Roberts v. McGrath*, 38 Wis. 52, and *Roberts v. Wood*, id. 60.

MEIBUS V. DODGE.

(38 Wis. 300.)

Animals — liability of owner for acts of ferocious dog — damages — evidence of defendant's pecuniary circumstances.

Defendant left his dog unsecured in his sleigh in a village street, knowing that the dog was ferocious and accustomed to bite people, and that on one occasion when so left he had attacked a passer-by. The plaintiff, a child of seven years, came to the sleigh and meddled with the whip, whereupon the dog threw him down and bit him. *Held*, (1) that the defendant was liable; (2) that if the jury should find that the defendant was guilty of gross and criminal negligence they might give exemplary damages, and (3) that evidence of the defendant's pecuniary circumstances was proper.

ACTION to recover damages for injuries occasioned to the plaintiff by the defendant's dog. The plaintiff, a boy seven years old, alleged that he was attacked and bitten by the defendant's dog, at the village of Waterloo, on the 7th of February, 1874; that the defendant, well knowing that the dog was of a ferocious disposition and accustomed to bite people, suffered him to go at large without being properly secured or guarded, and that while so negligently at large he bit the plaintiff. Defense, a general denial and averment that the plaintiff was trespassing upon defendant's property when the injury occurred. From the evidence it appeared that at the time of the injury the plaintiff had left the dog in his sleigh in the street of Waterloo, near the sidewalk; that plaintiff in passing along the sidewalk seized the end of defendant's whip which projected from the sleigh, whereupon the dog sprang upon him, threw him down and bit him. The evidence, though conflicting, tended to show that the defendant knew that the dog was ferocious and accustomed to bite people, and that at least once before when left to guard a team standing in a village street he had, without cause or provocation, attacked a passer-by.

The plaintiff was permitted to introduce evidence of defendant's pecuniary circumstances.

The jury were instructed that the recovery in this case could only be "for the pain and suffering which the child had endured;" and not for loss of his time, damage to his clothing, or expense of medical attendance; that, as the facts that the dog was the property of the defendant, and that he bit the plaintiff, were not contested, the main question for them was, whether defendant knew at the time that the dog had bitten other persons; that if he knew that fact, his allowing the dog to run at large, unmuzzled, and not taken care of in any such way as to secure

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others from being bitten, was negligence, such as would entitle plaintiff to recover : that if the jury should find " that this little lad, hardly old enough to know whether it would be wrong to meddle with the sleigh, did meddle with it, by taking out a whip or doing any thing of that sort, it would be no defense whatever to this action ; " that if they found for the plaintiff, they should assess his damages at such sum as they should deem reasonable under all the circumstances of this case, and might also include exemplary damages if they found that defendant, in allowing his dog to run at large without muzzling, was guilty of gross and criminal negligence — such as evinced on his part a wanton disregard of the safety of others.

Verdict for plaintiff, awarding him \$250 damages. A motion for a new trial, on the grounds of error in the instructions, insufficiency of evidence, and excessive damages, was denied ; and defendant appealed from a judgment on the verdict.

S. M. Cone and *D. Hall*, for appellant. 1. The charge of the court was to the effect that a boy seven years old cannot be guilty of wrong, or be in fault, so as to defeat or in any way affect the recovery in an action for injury brought on himself by his own willful trespass, wrong or reckless mischief. This was clearly error. *Lynch v. Smith*, 104 Mass. 52 ; *Munn v. Reed*, 4 Allen, 431 ; *Wright v. R. R. Co.*, id. 283 ; *Holly v. Boston Gas-Light Co.*, 8 Gray, 123 ; *R. R. Co. v. Stout*, 17 Wall. 657 ; *Shearm. & Redf. on Neg.*, § 49 and note, and cases there cited ; *Achtenhagen v. Watertown*, 18 Wis. 331 ; *Huchting v. Engel*, 17 id. 230 ; *R. R. Co. v. Gladmon*, 15 Wall. 401. 2. This was not a case for exemplary damages. The watch dog was legitimately used to prevent theft. The plaintiff was bitten because he was a trespasser. Defendant had a right to expect from him and from all others such care as they were capable of. His motive was praiseworthy. A muzzled dog would be a poor protection against adroit thieves. There was no evidence to show " gross and criminal negligence " on defendant's part — such negligence as evinced a wanton disregard of the safety of others. *Rogers v. Henry*, 32 Wis. 327.

Harlow Pease, for respondent.

COLE, J. The counsel for the defendant relies upon three exceptions, which were taken on the trial, to show error on the part of the court below in its rulings. And first, it is insisted that there was error in that portion of the charge in regard to contributory negligence by the child. Upon that question the court gave substantially this instruction : that if the

jury should find from the testimony that the lad was meddling with the sleigh of the defendant where the dog was at the time, it would not be a defense, because the negligence of the defendant's act consisted in allowing the animal to run at large unmuzzled, knowing that the dog had been accustomed to bite other individuals, if that was a fact, and he did know it. And the jury were told that if they were satisfied that the little lad — hardly old enough to know whether it would be wrong to meddle with the sleigh — did meddle with it, and if the lad meddled with it by taking out a whip, or doing any thing of that sort, it would be no defense to the action.

The counsel claims that if the boy was committing an act of trespass upon the defendant's sleigh, which was being guarded by the dog, as by meddling with a whip lying in the sleigh, or was interfering with the property in any way, this would protect the defendant from liability, even though he knew the dog was accustomed to bite persons. For, he says, it was the duty of the child to keep away from the sleigh, and not expose himself to be bitten by a fierce dog guarding it.

We are quite unable to adopt this view as to the measure of liability which the law imposes upon the defendant. The child was alone, and, in view of his age and situation, could not reasonably be expected to exercise that degree of care and vigilance which an adult would in the presence of such an animal. If he did meddle with the whip, "through his childish instincts and thoughtlessness," as some of the witnesses say he did, it was what might have been anticipated under the circumstances. There is quite a conflict in the testimony, whether there was any such whip in or about the sleigh; and also, as to whether the dog was in the sleigh at the time, or sitting on the ground by it, when he attacked the boy. The instruction, of course, assumes that the jury might find there was such a whip in the sleigh where the dog was at the time, and that the boy did meddle with it; and yet the ruling of the court is that this did not excuse the defendant, and that he was responsible for the injury done by his dog, if he knew it was accustomed to bite persons. It seems to us that the ruling of the court was correct, and that it was great negligence in the defendant to leave his dog, which was a dangerous animal, in that place, where it was extremely probable he would do some harm. We think that when the owner has knowledge of the ferocious disposition of his dog — has notice that the animal has left the sleigh which he was guarding, while it was standing in a public street, and has attacked persons passing along the highway (as it appeared this dog had done at least on one occasion, but a few weeks before, in the village of Columbus, as the defendant knew or should have known), — then it is the duty of the owner

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to keep the dog under safe restraint at home ; or, if he takes him abroad with him for the protection of his property, he must see to it that the animal is so muzzled or secured that he cannot bite and injure children and persons passing along the street, or resorting to the wagon or sleigh where the dog may be, for amusement and play. This obligation or duty the law imposes upon the owner of every dangerous animal ; and many cases of the highest authority hold the owner to a stricter responsibility. We are not, however, called upon to go beyond the facts of this case. Here the dog was left unsecured and unmuzzled, in the sleigh, which was standing near the sidewalk in the village. It was where children naturally would be passing and playing. The defendant should have anticipated the danger when he left the dog there, and have taken some precautions to guard against it. It is no sufficient answer to say that the dog was left in that situation for the protection of the sleigh, and that if the child had exercised care and watchfulness, and kept at a distance from the sleigh he would not have been injured. It is idle to claim that the defendant had the right, for the protection of his property, to leave a fierce dog guarding it in a public street, unsecured. And surely this child did not forfeit all claims to protection because he attempted to pull a stick from the sleigh, and did not carefully keep away from the place where the dog was. A man is not permitted, for the protection of his property under such circumstances, to use means endangering the life or safety of a human being. Children playing in the street are entitled to consideration, and certainly are entitled to protection from a ferocious dog left by the owner there unmuzzled. Nor can the owner of such a dog exempt himself from liability in case of an injury inflicted on a child, because it appears that the child did not act with the discretion and judgment of a person of mature years. *Munn v. Reed*, 4 Allen, 431-433. In the case of *Brown v. Carpenter*, 26 Vt. 638, C. J. REDFIELD uses the following language, in considering the sufficiency of a plea which put the defense for killing a dog upon the ground that the animal was *hostis communis*, a common enemy, which might be killed by any one if found at large. He says : " We think that a ferocious and overgrown dog, known to the owner or keeper to be accustomed to bite mankind, is to be regarded as at large, within the common import of those terms in a plea in bar, when he is so far free from restraint as to be liable to do mischief to man or beast ; and this such a dog is always liable to do when not physically restrained in the language of the judge in the court below. His being in the presence of his keeper affords no safe assurance that his known propensities will not prevail over the restraints of authority. That is the case with men often, and always liable to be

with ferocious animals, as is said by our judge. I think sufficient caution has not been used ; one who keeps a savage dog is bound to so secure it as to effectually prevent it doing mischief." And, among other authorities, the learned judge cites, with approval, *Smith v. Pelah*, 2 Strange, 1264, where it was held that the master was liable for all damage done by a ferocious dog who had once bitten a man, even though it happened by such person treading on the dog's toes. And many cases treat a savage dog as an outlaw and common nuisance, liable to be killed by any one. *Brown v. Carpenter*, *supra* ; *Blackman v. Simmons*, 3 Carr. & P. 138 ; *Sarch v. Blackburn*, 4 id. 297 ; *Hinckley v. Emerson*, 4 Cow. 351 ; *Loomis v. Terry*, 17 Wend. 496 ; *Putnam v. Payne*, 13 Johns. 312. In *Loomis v. Terry*, where the owner was held liable for damages done by his dog to the plaintiff's son, who, at the time of the injury, was committing a trespass in hunting upon his grounds on Sunday, COWEN, J., makes these remarks : "There can be no doubt that, as against a trespasser, a man may make any defensive erection, or keep any defensive animal which may be necessary to the protection of his grounds, provided he take due care to confine himself to necessity. But it has been held that in these and like cases, the defendant shall not be justified, even as against a trespasser, unless he give notice that the instrument of mischief is in the way." p. 499. This same liability has been enforced against a person keeping any other mischievous animal, with knowledge of its propensities, where it is held that he is bound to keep it secure at his peril. *Blackman v. Simmons*, *supra* ; *May v. Burdett*, 9 Q. B. 101 ; *Jackson v. Smithson*, 15 M. & W. 563 ; *Oakes v. Spaulding*, 40 Vt. 347 ; *Pickett v. Crook*, 20 Wis. 358 ; *Popplewell v. Pierce*, 10 Cush. 509. *May v. Burdett* was an action for an injury received from a monkey, which the defendant knew to be accustomed to bite people. After verdict, it was objected, on the part of the defendant, that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal. Lord DENMAN, C. J., delivering the judgment, said : "A great many cases and precedents were cited upon the argument ; and the conclusion to be drawn from them appears to us to be, that the declaration is good upon the face of it ; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the *keeping* the animal after *knowledge* of its mischievous propensities." In other words, the owner is held bound so to secure it

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as to keep it from doing an injury, *at his peril*. The law upon this subject is so fully expounded in the above cases, and in *Card v. Oass*, 5 Man., Gran. & S. 622 (57 Eng. C. L.), that no further reference to authorities is deemed necessary. It will be seen that the law made it the duty of the defendant to use due and reasonable care and precaution in keeping his dog, knowing its savage disposition; and he had no right to leave him unsecured in a public street where children were passing. And the fact that the child in this case was meddling with a whip in the sleigh where the dog was at the time, does not protect the owner from liability.

Another portion of the charge excepted to was the direction of the court in respect to exemplary damages. On this point the court instructed the jury that they might include in their verdict punitive or exemplary damages, providing they were satisfied from the evidence that the defendant had been guilty of gross and criminal negligence in allowing the dog to run at large without being muzzled—that is, had been guilty of such negligence as evinced a wanton disregard of the safety of others. This instruction, as a proposition of law, was fully warranted by the decision in *Pickett v. Crook*, *supra*. And that there was evidence to which such an instruction was fairly applicable, we think cannot be denied in view of what occurred at Columbus. The dog on that occasion evinced a most savage disposition, of which the defendant had notice. The counsel for the defendant argues that it was legitimate and proper for the owner, after a knowledge of that occurrence, to take the dog with him into a village to watch his sleigh and prevent theft. The law is otherwise settled.

If the case was one for exemplary damages in any aspect, there was no error in asking the witness as to the pecuniary circumstances of the defendant.

We think the judgment of the Circuit Court must be affirmed.

By the Court.—It is so ordered.

RYAN, C. J., took no part in the decision of this cause.

MORRILL V. STATE.

(38 Wis. 428.)

Constitutional law — hawkers and peddlers — “carrying to sell” — police power.

A statute made it a penal offense to travel from place to place “for the purpose of carrying to sell, or exposing to sale any goods, wares and merchandise” without a license as a broker and peddler. *Held*, (1) that the act was valid; (2) that the act was an exercise of the police power of the State and therefore not repugnant to the requirement of the Constitution that “the rule of taxation should be uniform;” and (3) that it was not in violation of the Federal Constitution.

THE plaintiff in error was prosecuted and convicted in the Municipal Court of Madison for a violation of ch. 72, Laws of 1870, concerning hawkers and peddlers. The charge in the complaint is, that he traveled from place to place in Dane county “for the purpose of carrying to sell and exposing to sale certain goods, wares and merchandise, to wit, sewing machines, without having obtained a license as hawker and peddler according to law, and the said sewing machines not being the work or production or manufacture of the said *Morrill*, manufactured or grown in this State in any manner, nor of any resident of this State.”

The plaintiff in error thereupon appealed to the Circuit Court, in which court he was tried and again convicted; and, by writ of error, he removed the record and judgment of conviction into this court, for review.

Instructions which present all of the questions considered by this court, were proposed on behalf of the plaintiff in error, and refused by the Circuit Court.

Lewis & Tenney and Cottrill & Cary, for plaintiff in error. 1. Can the legislature make it a penal offense to travel from place to place for the purpose of offering for sale goods, wares, and merchandise? 2. The statute does not provide a punishment for doing the acts alleged to have been done by the plaintiff in error. 3. The machines sold in this case were “manufactured within this State,” within the meaning of section 14 of the statute. 4. The several parts of the act, taken together, provide as follows: (1) Citizens of this State may sell articles grown, produced or manufactured by them, without a license. (2) Persons who have not a legal residence in this State, *i. e.*, who are not citizens thereof, although selling goods produced or manufactured within this State, must pay license. (3) Citizens of this State must pay a license if the goods sold by them are grown or manufactured, by themselves or others, out of the State. The law, therefore, (1) Discriminates in favor of citizens of

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this State against the citizens of other States, as to the right to sell without license. (2) Discriminates in favor of the resident producer and manufacturer against the productions and manufactures of citizens of other States. (3) Lays a tax, duty, or impost (to the extent of the license required) upon the productions and manufactures of other States, brought into this State for sale. (4) Is an attempt to regulate commerce between the States. The right to license is derived from the right to tax, and is but another method of exercising the taxing power of the State. A tax or license to sell goods is a tax upon the goods themselves. *McCulloch v. Maryland*, 4 Wheat. 431-2; *Brown v. Maryland*, 12 id. 446; *Minot v. R. R. Co.*, 2 Abb. (U. S.) 323; 7 Phila. 555; *Cooley's Con. Lim.* 201, 586-7. While States have the right to make and enforce police regulations, a license the chief purpose of which is to raise revenue, cannot be regarded as a police regulation. 2 Abb. (U. S.) 323, 15 Pet. 511; 17 Wall. 560; *Cooley's Con. Lim.*, *ubi supra*. The Federal Constitution (art. 1, § 8, subd. 3) vests in Congress the power "to regulate commerce with foreign nations, and among the several States;" and this power is exclusive. 14 Pet. 574; *Passenger Cases*, 7 How. 394; 12 Wheat. 446; *Gibbons v. Ogden*, 9 id. 1. Commerce between the States means intercourse and traffic between them by their respective citizens. 9 Wheat. 189-194. It means an exchange of commodities. 7 How. 401-407; 15 Pet. 511. The power to regulate this commerce was vested in Congress in order to secure equality and freedom in commercial intercourse, against discriminating State legislation. *R. R. Co. v. Richmond*, 19 Wall. 584. The taxing power of the State cannot interfere with any regulations of commerce. 12 Wheat. 449; *Almy v. California*, 24 How. 169. The States may tax all property within their limits, which has become mingled with the property of the State, *when such tax does not discriminate against such property as belonging to residents or citizens of other States, or as the production of other States*. *Osborn v. Mobile*, 16 Wall. 479; 10 Conn. 343-4. But a tax levied by a State, whether by the exaction of a license or otherwise, upon the transportation of goods into such State from another, or upon the sale of goods brought into such State from another, discriminating against them as the productions of such other State, or as belonging to citizens of another State, and taxing them at a higher rate than the productions of the State levying the tax, or than like property of its citizens, for the purpose of giving the productions or the citizens of such State an advantage over those of another State, is an interference with or regulation of commerce, forbidden by said section 8 of article 1. 12 Wheat. 449; 2 Abb. (U. S.) 323; 7 Phila. 555; 5 How.

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595: *Woodruff v. Parham*, 8 Wall. 123; *Hinson v. Lott*, id. 148; *Ward v. Maryland*, 12 id. 418; *The Delaware R. R. Tax*, 18 id. 206; *State Freight Tax*, 15 id. 232; *Tax on Railroad Gross Receipts*, id. 284. 2. Counsel also cited the following provisions of the Federal Constitution: (1) Art. 1, sec. 10, subd. 2: "No State shall, without the consent of Congress, lay any imposts or duties," etc. (2) Art. 4, sec. 2: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." (3) The Federal Constitution (art. 1, § 8, subd. 8) empowers Congress to grant to authors and inventors "the exclusive right to their respective writings and discoveries." This, of course, includes the right to sell, use and dispose of; otherwise it would be useless. The power to tax is a power to destroy. 4 Wheat. 431-2. If a State can regulate or interfere with the power to sell or use a patent or patented article, it may tax it to such an extent as to prevent the sale or use within its limits. *Helm v. First Nat. Bk.*, 43 Ind. 167; 4 Wheat. 432. When, however, a patented article has become mixed with the general mass of property, it may doubtless be taxed like other property, if no discrimination is made against it as such. (4) If section 14 be held void, the remainder of the statute cannot be regarded as valid; since this would clearly defeat the legislative intent in framing the law. (5) The license required by the statute being essentially a tax, its substantial object being to raise a revenue, it is a violation of the rule of uniformity in taxation established by article 8, section 1 of the State Constitution. *Att'y Gen. v. Plankroad Co.*, 11 Wis. 35.

The Attorney-General for the State.

LYON, J. I. The learned counsel for the plaintiff in error have, without argument, submitted to our consideration the question whether it is competent for the legislature to make it a penal offense for any person to travel from place to place "for the purpose of carrying to sell, or exposing to sale, any goods, wares and merchandise," unless such person have a license as a hawker and peddler. The point of this objection to the validity of the statute seems to be, that the actual sale of the articles is not expressly made an ingredient in the offense.

The statute was doubtless enacted in the interest of merchants having fixed places of trade, on the theory that a sound public policy demands that these should be encouraged, and traveling merchants or peddlers discouraged; and for the further purpose of protecting honest and well-disposed citizens from the arts and importunities, and frequently from the dishonest practices, of a class of traders to whom they are usually

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strangers, and who are not as directly amenable to those legal and social restraints which must necessarily greatly influence the business conduct of a merchant having a fixed place of business, and depending for his patronage upon one and the same community. These objects may be as well attained by merely prohibiting the traveling for the purpose of carrying the merchandise to sell, as by prohibiting the sale in terms. We think that if the act would be valid had it expressly prohibited sales by hawkers and peddlers without license, it is valid in its present form.

[The second and third questions are not material.]

IV. It is further argued that, in view of the exemptions granted by section 14, the act is a violation of that provision of our Constitution which ordains that "the rule of taxation shall be uniform." Art. 8, § 1. The attorney-general contends that the act is not an exercise of the taxing power, but of the police power of the State. We are to determine which of these positions is correct.

The license fees required by the act of 1870 go into the State treasury and constitute a portion of the revenue of the State. In a certain sense, therefore, those fees are taxes, and the act requiring them to be paid an exercise of a power of taxation. Yet revenue may incidentally result from an undisputed exercise of the police power. Indeed, such is usually the result of police regulations, whether made directly by the legislature, or by a municipality acting under authority of law. But that fact does not divest the regulation of its police character and render it an exercise of the taxing power. Laws prohibiting the sale of liquor or the keeping of dogs, without license, are familiar illustrations of the exercise of police power. Such laws have been upheld by this court upon the express ground that they were not an exercise of the taxing, but of the police power. *Carter v. Dow*, 16 Wis. 298; *Tenney v. Lenz*, id. 566; *State v. Ludington*, 33 id. 107. Of the same character is a law requiring certain insurance agents to pay a percentage of the premium received by them to the local fire department. *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 136. In *Tenney v. Lenz* it was expressly held that the fact that the license fees produced revenue did not change the character of the law. It was still an exercise of the police power.

That the law of 1870 is an exercise by the legislature of police power is the more apparent when we consider the nature and extent of that power. Judge COOLEY, in his admirable treatise on Constitutional Limitations, says: "The police power of a State, in a comprehensive sense, embraces the system of internal regulation, by which it is sought not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizen with citizen those

rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to secure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others." p. 572. And the same learned author quotes approvingly the language of Chief Justice SHAW in *Commonwealth v. Alger*, 7 Cush. 84, on the same subject: "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

The reasons (or at least some of them) why the legislature enacted the law of 1870 have already been stated. That they are stated correctly, and that the common law regarded hawkers and peddlers with disfavor, and their vocation opposed in some degree to public policy, will appear by reference to Jacobs' Law Dictionary. We there find the following: "HAWKERS. Those deceitful Fellows who went from Place to Place, buying and selling Brass, Pewter and other Goods and Merchandise, which ought to be uttered in open Market, were of old so called; and the appellation seems to grow from their uncertain Wandering, like Persons that with *Hawks* seize their Game where they can find it. They are mentioned Stat. 25 Henry 8, cap. 6, and 33 Hen. 8, cap. 4. *Hawkers* and *Peddlers*, etc., going from Town to Town or House to House, are now to pay a Fine and Duty to the King." The author then refers to 8 and 9 W. 3, cap. 25 (A. D. 1697), and several other statutes, which in principle are very similar to the act of 1870. Of course we do not intend to apply any epithet contained in the above extract to persons engaged in the business of hawkers and peddlers; for we know that very many honest and highly respectable people are so engaged at the present day. We give the language of the author merely to show the grounds upon which, centuries ago, parliament regulated and restricted the business, and that such regulation and restriction is an exercise of police power in the interest of the public. But with this disclaimer we must be permitted to add that, undoubtedly, resort is often had to this business for the sole purpose of obtaining admittance (which could not otherwise be obtained) into private dwelling-houses in furtherance of some criminal or unlawful object. This is another reason why the restriction or regulation of the business is an exercise of police power.

Entertaining these views of the character of the law of 1870, it becomes unnecessary to decide whether, were the enactment of that law an exercise by the legislature of the power of taxation, it violates the rule of uniformity prescribed by the Constitution.

But it may be said that the act discriminates unjustly against certain classes, and for that reason should not be sustained as a valid exercise of legislative power. Conceding that it does so discriminate, that is a good reason why the act should be amended, but is not ground for holding it void. The decisions of this court in the cases above cited, on the nature and extent of the police power, go upon the principle that it is competent for the legislature, in the exercise of that power, to prohibit entirely the act or business licensed, and the power to prohibit (where the act or business is not *malum in se*) includes the power to license on such terms as the legislature may see fit to impose, no matter how onerous and unequal the terms may be. This subject is so fully discussed in those cases, particularly in the opinion by Chief Justice DIXON in *State v. Ludington*, that further discussion of it here is quite unnecessary. That the legislature has power to prohibit the carrying on of the business of hawkers and peddlers, we do not doubt.

V. Thus far we have considered the case without any direct reference to the effect of any provision of the Federal Constitution upon the act of 1870. The counsel for the plaintiff in error, with great ingenuity of argument, maintain that the act violates the following clauses of that instrument: Art. 1, sec. 8. The Congress shall have power: * * * 8. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes: * * * 8. To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries. * * * Sec. 9, subd. 5. No tax or duty shall be laid on articles exported from any State. * * * Sec. 10, subd. 2. No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except, etc. * * * Art. 4, sec. 2, subd. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. The bearing of these clauses of the Federal Constitution upon the act of 1870 will not be discussed in detail or at any considerable length, and a review of the numerous cases cited in the argument will not be attempted. The act being a mere police regulation, those clauses of the Constitution relating to taxes and imposts have no application to the case. Neither does the clause relating to inter-State commerce: for the act is not a regulation of commerce. It restricts hawkers and peddlers, but does not interfere with the regular and usual course of trade and business. The Singer manufacturing company may sell its wares in this State at fixed places of business, without charge or obstruction, just as resident merchants may sell their wares. But if that company, or any citizen of another State, or any resident

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of this State, desires to hawk wares from place to place, it or he must submit to the terms which the legislature see fit to impose upon persons doing business in that manner. And whatever those terms may be, they cannot affect the "privileges and immunities" of any one, because they do not affect any right which pertains to citizenship. *Conner v. Elliot*, 18 How. 598.

We cannot concede for a moment that by ratifying the Federal Constitution the States ever intended to surrender to the Federal government their control of matters so purely internal and municipal as the prohibiting or licensing of the sale of liquor, the keeping of dogs, the business of hawkers and peddlers, and the like; and although all of the States have legislated freely on these and kindred subjects, ever since the Federal Constitution had an existence, so far as we are advised, neither the Federal nor State courts have yet asserted the exclusive control of the general government over such matters. On the other hand the authority of the State legislatures to enact laws of the character above indicated has been often asserted in the Federal as well as in the State courts. So much of State sovereignty seems to have been left intact and unassailed. The recorded decisions of this court, and all of its traditions, forbid that we should be the first to assail it.

Upon the whole case we conclude that the act of 1870 is a valid enactment, and hence, that the judgment of the Circuit Court should be affirmed.

By the Court. — Judgment affirmed.

GREEN V. TOWN OF BRIDGE CREEK.

(38 Wis. 449.)

Highway — liability of town for defective private bridge not in limit of highway — duty of town to warn travelers of defect.

Plaintiff was injured while crossing a bridge over a stream in defendant's town, but which bridge was built by private individuals for their own convenience, and was not within the limit of the highway. The means of crossing the stream on the adjacent highway were difficult, and the main travel crossed the bridge. The statute made towns liable for injuries happening by reason of the insufficiency or want of repair of any highway or bridge therein. *Held*, (1) that the town was not bound to keep the bridge in repair, and (2) that the bridge not being within the limits of the highway the town was not bound to warn travelers of its dangerous condition.

ACTION to recover damages under the statute for injuries received by the falling of a bridge in defendant's town. The statute pro-

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vided that if any damage should happen to any person, or his property, by reason of the insufficiency or want of repair of any road or bridge in any town of the State, the town should be liable therefor.

The plaintiff, while driving from Eau Claire to his home, drove upon the bridge in question, over Bridge Creek, which fell, injuring himself and property. The defendant denied that the bridge was a public bridge, or that it was bound to keep it in repair. It appears that there were two ways over Bridge Creek, about forty rods apart, one called by the witnesses, and in the opinion, the "Old pinery road," and the other the "road across the crown of the hill." The former crossed Bridge Creek at a ford; the other over a bridge built by private persons. The other facts are stated in the opinion.

The jury found for the plaintiff, and from the judgment entered on the verdict the defendant appealed.

W. P. Bartlett and *Henry H. Hayden*, for appellant. The plaintiff being off the highway when injured has no claim against the town. *Hawes v. Fox Lake*, 33 Wis. 442; *Chapman v. Cook*, 14 Am. Rep. 686; 10 R. I. 304. By maintaining a parallel road round the town negatived the idea that the way and bridge where the injury occurred were public. *Houfe v. Town of Fulton*, 34 Wis. 617, 618; S. C., 17 Am. Rep. 463. The town was not bound to erect barriers to prevent the public crossing the bridge. *Chapman v. Cook*, 14 Am. Rep. 686; *Sparhawk v. Salem*, 1 Allen, 30; *Wheeler v. Westport*, 30 Wis. 405.

A. Meggett, for respondent, argued the following points, with others:

1. The evidence showed that the bridge was placed as near to the old pinery road (or that branch of it mainly traveled for ten years over the brow of the hill,) as the nature of the ground would permit, and, the main travel having passed over it as a part of this highway from its erection to the time of the accident, with the defendant's consent, shown by its acquiescence and its failure to provide any other suitable crossing over the creek, this bridge became a part of the highway, even though placed there by volunteers, and though the user was for less than twenty years. *Savage v. Bangor*, 40 Me. 178; *Requa v. City of Rochester*, 45 N. Y. 129; *State v. Campton*, 2 N. H. 513; *Wilson v. Jefferson*, 13 Iowa, 181; *Ward v. Jefferson*, 24 Wis. 345-6.
2. The evidence shows that the old ford, at the time of the accident, was impassable from high water and other causes; the plaintiff, following the main traveled track, crossed this bridge from necessity, as the only point at which he could cross on that road; and the defendant, not having provided any other crossing there, nor

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put up barriers to warn travelers off this road, was liable for the defect therein. *Cobb v. Standish*, 14 Me. 198; *Burnham v. Boston*, 10 Allen, 290; *Cassedy v. Stockbridge*, 21 Vt. 391; *Ireland v. O. H. & S. Plankroad Co.*, 18 N. Y. 534; *Milwaukee v. Davis*, 6 Wis. 388-5; *Kelley v. Fond du Lac*, 31 id. 186; *Wheeler v. Westport*, 30 id. 403-5; *Hawes v. Fox Lake*, 33 id. 441. 8. The question whether the bridge became a part of the highway was one for the jury. *Lawrence v. Mt. Vernon*, 35 Me. 100; *Blute v. Scribner*, 23 Wis. 359; *Kelley v. Fond du Lac*, 31 id. 187; *Barstow v. Berlin*, 34 id. 361; *McCabe v. Town of Hammond*, id. 593; *Butler v. Railway Co.*, 28 id. 501.

COLE, J. For the purposes of this case it may be assumed that the road known as the old pinery road, down the ravine and across Bridge Creek at the ford, had become a public highway by user or prescription. It may also be conceded that the road across the crown of the hill, which turned back into the main track, and which the evidence showed had been traveled over for more than ten years, was likewise a highway by user. But still the town rests its defense upon the ground that the bridge where the accident occurred was no part of either of these highways, and that it was under no obligation to keep it in suitable repair. Whether, under the circumstances, it was the duty of the town to keep the bridge in sufficient repair, or, if not, whether it should have employed some means to warn persons of its dangerous condition, are questions presented on the record and ably discussed on the argument.

The bridge in question was built in December, 1869, by persons living in the adjoining town of Lincoln, as it appears, for their own accommodation in crossing the creek at that point. There is no evidence that the authorities of the defendant town have ever adopted the bridge as belonging to the town, nor have they exercised any control over it, or treated it as constituting a part of any highway of the town. The bridge is ten rods distant from the nearest point in the highway leading over the crown of the hill, and seventeen rods distant from the nearest approach of the old pinery road. The ford, which was and is the usual crossing of the old pinery road, is up the creek from the bridge over forty rods by a direct line. No travel ever crossed the creek where this bridge, called the Murphy bridge, was erected, except for less than two and one-half years while it existed; and after its destruction the travel all returned to the old ford. The evidence shows that the road by the old ford continued open while the Murphy bridge existed, and more or less travel continued to cross there, though the crossing was difficult and at times of high water even dangerous. But there was another highway leading from Eau

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Claire to the pineries in the same general direction as the old pinery road, and provided with a bridge across the creek at the dalles, about a mile above the Murphy bridge; and this road led to Sugartown, where the plaintiff resided. The old pinery road generally passed through a sandy, unimproved country; and in places the travel diverged from, and again returned to, the old track. The plaintiff was familiar with the country, and was acquainted with the different roads and crossings. The water was high in the creek when the accident happened, though the road by the old ford was passable, the ford being actually crossed the next day by George S. Hyde, one of the plaintiff's witnesses, with his wagon and team. After the Murphy bridge was built, the main travel crossed it, and it shortened the distance to go that way rather than by the old ford. The bridge was only five rods east of the line between the towns of Lincoln and Bridge Creek, and the authorities of neither town had taken any means to prevent or warn travelers against crossing it. These are the leading facts upon which the liability of the defendant is to be determined.

The first question to be considered is, was it the duty of the defendant to keep the Murphy bridge, built in the manner indicated, in a safe condition for the passage of the public travel over it, and is it liable for an injury which occurred in consequence of its being out of repair? The statute imposes upon a town the duty of keeping all public highways and bridges within its limits in proper repair, and makes it liable for any damages which shall happen to any person, or to his property, by reason of their insufficiency. § 120, ch. 19, R. S. This statute obviously refers to the public highways of the town in fact, or highways which have become such in some way known to the law, and which the town is bound to repair, and the bridges situated on such highways constituting a part thereof. The liability of the town does not always depend upon the existence of a bridge or highway *de jure*, as was decided in *Houfe v. The Town of Fulton*, 34 Wis. 608; S. C., 17 Am. Rep. 468. In that case the chief justice remarks that the *de facto* existence of a highway or bridge, as where a town has maintained or recognized a bridge or highway as belonging to it and under its control, will suffice to charge the town with the duty of keeping it in a suitable and safe condition. In the *Houfe* case, the bridge was built across Rock river, a navigable stream, without the permission of the legislature, and the town sought to avoid its liability to keep it in proper repair, on the ground that the structure was an unlawful one. But it appearing that the bridge, though originally built by private subscription, was upon a highway, and had been used by the public at all times to pass over the river, and had also been accepted by the town and treated as town property, the town was held liable for an injury

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happening by reason of its insufficiency, though the bridge might have been maintained without lawful right. But the bridge in question does not come within the application of any such principle or rule of law. This bridge was built by volunteers, without any authority from the defendant, and at least ten rods distant from any public highway. It was erected for the accommodation of the persons who built it, though the public have likewise used it. But it is beyond the limits of any highway which the town is bound to repair, and it does not, like that in the *Houfe* case, connect portions of road on each side of the creek, which were highways of the town. The town has not adopted it, nor recognized it in any manner as a bridge belonging to the town. Were the bridge erected within the limits of the highway by private individuals, there would be much reason for holding that the town was bound to adopt it as a part of the highway, and keep it in repair, or remove it from the highway altogether. See *The King v. The Inhabitants of West Riding of Yorkshire*, 2 East, 341. But such is not the case. The bridge is not a public bridge, nor is the way from the bottom of the hill across the creek at that point a highway by use. We have not been referred to any case which would be an authority for holding the town liable for the repair of a bridge built by individuals, as this was, distant from any public highway, which the town has never recognized as a bridge belonging to it or under its control.

The case of *Requa v. City of Rochester*, 45 N. Y. 180; S. C., 6 Am. Rep. 52, is no authority for holding the town bound to repair this bridge upon the facts disclosed in the evidence. In that case an excavation was made in a street by the authorities of the city, so as to cause an abrupt descent from a public alley to the street, and rendered egress from the alley inconvenient and dangerous. This excavation had been bridged by a volunteer, and the city had allowed the bridge to remain there for years. The court held, upon the facts of the case, that this bridge became the property of the city, and, as it was the duty of the city to keep its streets and public alleys in a condition for safe passage over them, it was bound to keep this bridge in suitable repair.

The cases of *Cobb v. Inhabitants of Standish*, 14 Me. 198, and *Savage v. Bangor*, 40 id. 176, are not at all analogous to the one before us. In those cases the defects were within the limits of the highways.

The fact that the main travel passed over the bridge after its erection, without objection from the authorities of the town, cannot render the town responsible for the repair of the bridge, unless the structure was situated on and constituted a part of a public highway. The injury was occasioned by defects in a private bridge, and not by defects in a public

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bridge. For the bridge was so far distant from any public highway, that in no sense did it constitute any portion or part of a highway of the town. Nor do we well see what right the authorities of the town had to object to persons crossing this bridge who might be willing to take the risk of doing so.

It is said by plaintiff's counsel, that the condition of the old ford was such that the plaintiff was compelled to cross the bridge in order to pursue his journey home to Sugartown, and that the town is responsible for imposing upon him this risk. The crossing by the old ford in times of high water was confessedly difficult, but, as before remarked, was not impracticable at this time. But the highway across the creek at the dalles was provided with a safe bridge, which the plaintiff might have taken and avoided all danger. It must be borne in mind that the old pinery road led through a barren and uncultivated country, where population was sparse. And it would be onerous to require towns in such districts to build and maintain as many bridges as in more wealthy and populous communities. We do not, however, intend to relieve towns from the duty the statute imposes to keep the highways and bridges within their limits in a suitable condition for public travel. Had the bridge where the injury was received been upon a public highway which the town was bound to keep in a safe and proper condition, the liability would be enforced.

But again it is said the town was negligent in not using some means to warn travelers off the way on which the bridge was situated, and to prevent them from incurring danger in crossing it. The evidence shows very clearly that the plaintiff was well acquainted with this bridge, having crossed it but three days before the accident, while going to Eau Claire. A notice to him of its obvious defects and insufficiency would afford no information which he did not already possess. He was perfectly familiar with the bridge, and doubtless had as much knowledge of its condition as any one. But, under the circumstances of the case, we cannot assent to the proposition that it was the duty of the defendant town to place barriers across the way leading from the highway over the hill to this bridge; or to post notices informing the public that the bridge did not belong to the town, or that it was out of repair. It is apparent that if barriers were placed or notices posted anywhere, in order to be effectual for warning, they should have been placed or posted at or near the point where the track diverged from the highway, which would be in the town of Lincoln. But we do not understand it to be the duty of a town to provide barriers or post notices to prevent travelers from driving off the public highway to places of danger not contiguous to the high-

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way but distant from it. In *Chapman v. Cook*, 10 R. I. 304; S. C., 14 Am. Rep. 686, the court say that no such obligation rests upon the town, and the doctrine seems reasonable and just. In that case an accident happened to one who drove off by mistake from the public highway upon a private way connected therewith, and was injured by a defect in the private way some fifty to one hundred feet from the junction of the two ways. And it was claimed that it was the duty of the town, knowing the private way to be dangerous, to place a fence at the deviation so as to prevent persons passing along the highway from driving off into it. But the court, in a well-considered opinion, overruled the position, and denied that any such duty was imposed by law upon the town. There is nothing in this case in conflict with *Burnham v. The City of Boston*, 10 Allen, 290. In the latter case there was an excavation within the limits of one of the streets of the city, and it appeared that persons were accustomed to pass on a way, either public or private, over adjacent lots, into the street where the excavation existed. The city had provided no barrier for the purpose of preventing persons who passed over the way from the adjoining lots into the street from falling into the excavation. And it was held that the city had unreasonably omitted to erect such a barrier, and was guilty of negligence for which it was liable to a person injured in consequence of the excavation. Substantially the same doctrine was laid down by this court in *The City of Milwaukee v. Davis*, 6 Wis. 377. See also *Seward v. The Town of Milford*, 21 id. 485. But in these cases the defect was one in the highway itself, and the danger to be guarded against was not distant from the street, as in the case before us. Here the danger was not any danger upon any public highway, and we see no ground for holding that the town should have adopted measures to prevent persons from leaving the highway and crossing this private bridge. It seems to us that whoever went there, under the circumstances, went at his own risk, and must abide the consequences. These views are decisive of this case, and require a reversal of the judgment.

By the Court. — The judgment of the Circuit Court is reversed, and a new trial ordered.

Nudd v. Montanye.

NUDD v. MONTANYE.

(38 Wis. 511.)

Bailment — bailee estopped to deny bailor's title.

Plaintiff purchased property of J. S. and lent it to defendant to be returned upon demand. J. S. was afterward adjudged a bankrupt, and the defendant while so holding as bailee bought the property of the bankrupt's assignee. Held, that defendant could not set up against the plaintiff the title so acquired even if the original transfer to plaintiff was in fraud of the bankrupt act.

REPLEVIN, for "a pair or set of hay scales, or scales for the weighing of stock, heavy loads," etc., "formerly owned by one Norton Emmons;" but the ownership and right of possession are alleged to have been in the plaintiffs since January 1, 1872. The answer avers that Norton Emmons was declared a bankrupt, on his petition filed February 18, 1871; that on or about the 7th of January previous, being then insolvent, and acting in contemplation of such insolvency, and with a view to give preference to plaintiffs as his creditors, Emmons assigned a large part of his property, including that here in question, to the plaintiffs, who had reasonable cause to believe that Emmons was insolvent; that such assignment was made in fraud of the provisions of the bankrupt law; that Emmons never delivered possession of the property to plaintiffs; and that one Barrows, his assignee in bankruptcy, took possession of it, with the other effects of Emmons conveyed by the assignment, and, in April, 1872, by leave of the bankrupt court, sold and delivered it to defendants as the property of said bankrupt, and they claim to hold and own it by virtue of such sale.

At the trial, the court refused to give to the jury the instruction recited in the first paragraph of the opinion, *infra*, there being testimony to which the same was pertinent.

The defendants had a verdict and judgment; and the plaintiffs appealed.

Vilas & Bryant, for appellants. It is undisputed that the defendants obtained possession of the scales as bailees of the plaintiff, under an agreement that they were to use and take care of them and return them to the plaintiff, or, what is the same thing, return the key. Having so obtained possession, they cannot, while in possession, set up a title derived from a third party. *Hawes v. Watson*, 2 Barn. & Cress. 540; 9 E. C. L. 170; *Harman v. Anderson*, 2 Campb. 248; *Dixon v. Hammon*, 2 Barn. & Ald. 810; *Gosling v. Birnie*, 7 Bing. 339; *Holbrook* VOL. XX.—4

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v *Wright*, 24 Wend. 169; *Marvin v. Elwood*, 11 Paige, 365; *McKay v. Draper*, 27 N. Y. 260; *Barnard v. Kobbe*, 3 Daly, 35; *Reed v. Reed*, 18 Iowa, 5; *Estes v. Boothe*, 20 Ark. 588.

Lewis & Tenney and *J. C. McKenney*, for respondents.

COLE. J. In order to dispose of this case it is unnecessary to consider and decide all the questions which were discussed by counsel on the argument, and we shall not attempt to do so. Our attention will be confined to a consideration of the exception taken to the refusal of the Circuit Court to give the following instruction asked on the part of the plaintiffs, namely: "If the jury find that the defendants obtained possession of the scales from the plaintiffs directly as the agents and tenants of the plaintiffs, and as a loan to the defendants, as the plaintiffs testify, then the defendants are estopped from setting up a title derived from any third party while they were so holding possession, and the plaintiffs should recover."

The instruction was founded upon the testimony of the plaintiffs introduced on the trial, which tended to prove that the scales in controversy were loaned by them to the defendants to be used and taken care of; and that the possession of the scales, or, what was equivalent to the possession, the keys of the scales, were to be returned to the plaintiffs whenever requested. It appeared from the evidence that the plaintiffs purchased the scales of one Norton Emmons in January, 1871, and that the bailment by them to the defendants was in June or July following. In March, 1871, Emmons was adjudged a bankrupt; and in February, 1872, the defendants, while holding the scales under the contract of bailment, purchased them of the assignee in bankruptcy as part of the estate of the bankrupt. And the counsel for the plaintiffs insists that the defendants had no right, while in possession of the scales as the agents or bailees of the plaintiffs, to acquire a title from a third party, and set it up to defeat the action. This he claims was an act of bad faith on their part, it being their duty to take care of the scales according to the contract of bailment, and to restore them to the plaintiffs when demanded. It seems to us that this position is sound and in accord with legal principles.

The general rule of law upon this subject, as laid down in the books, is, that the one who has received property from another as his bailee or agent, must restore or account for that property to him from whom he has received it. Story on Bailm., §§ 102 and 103; Story on Agency, § 217; *Biddle v. Bond*, 6 Best & Smith, 225; *Nickolson v. Knowles*, 5

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Mad. 47; *White v. Bartlett*, 9 Bingham, 378. "Generally speaking," says Mr. Justice STORY, "restitution of the property deposited is to be made to the bailor; although there may be special cases in which that would not be required or justified. As, for instance, if the goods have been deposited by a thief who has been convicted, and the owner reclaims them, the latter alone is entitled to receive them." Story on Bailm., *supra*. And the learned author shows that by the older authorities it was held that if the goods of A were bailed by B to C, C must redeliver them to B, and was not allowed to alter that possession which had been committed to him in order to restore it to the right owner. But this rule has been relaxed by some of the modern authorities, as will be seen in *Biddle v. Bond*, *supra*; *Gosling v. Birnie*, 7 Bing. 339; *Thorne v. Tilbury*, 3 Hurl. & Nor. 534; *Cheeseman v. Exall*, 6 Exch. 341; *Hardman v. Willcock*, note (a) to *White v. Bartlett*, *supra*. But it is not necessary to dwell upon these cases, as we do not intend to come in conflict with them. Chancellor WALWORTH, in *Marvin v. Ellwood*, 11 Paige, 366-376, lays down the rule applicable to the case before us. He says "A bailee or agent who has received property as such, is at all times at liberty to show that his bailor or principal has parted with his interest in the property subsequent to the bailment, or to the delivery to the agent. But such bailee or agent cannot at law dispute the original title of the person from whom he received the property." In *Cheeseman v. Exall*, MARTIN, B., observes: "There are numerous cases in connection with wharves and docks, in which if the party intrusted with the possession of property were not estopped from denying the title of the person from whom he received it, it would be difficult to transact commercial business." In that case a party had pledged property to which he had no title or right to pledge, and, in an action by the pledgor, the person with whom the property was pledged was allowed to set up the *jus tertii* to defeat a recovery. In *Biddle v. Bond*, there is a full examination of the English cases bearing upon the question as to when or under what circumstances an agent or bailee may set up the *jus tertii* in an action by his principal, and when the bailee would be estopped to deny the bailor's title. Says BLACKBURN, J.: "We think that the true ground on which a bailee may set up the *jus tertii* is that indicated in *Shelbury v. Scotsford*, Yelv. 23, viz.: that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person." In this case, however, the defendants have acquired an adverse title, and seek to set it up to defeat the rights of their principal against their own man-

ifest obligations to him. It is as though a tenant in possession of land should acquire an adverse title and set it up to defeat the title of his landlord. The cases are strictly analogous; and if the law will not allow the tenant to commit such an act of bad faith toward his landlord, it ought not to permit the defendants to avail themselves of an adverse title acquired while holding the property as agents and bailees of the plaintiffs. The defendants had agreed to make restitution of the property to the plaintiffs. To relieve themselves from that duty, they purchase an adverse title and seek to hold the property under it. If agents and bailees were permitted thus to deal with property intrusted to their care — were allowed to buy in adverse claims against it, and set them up as against their principals or bailors — it would, indeed, “be difficult to transact commercial business.”

By the Court. — The judgment of the Circuit Court is reversed, and a new trial ordered.

KNOX v. CLIFFORD.

(38 Wis. 651.)

Sunday — note made on — estoppel of maker.

The maker of a promissory note bearing date on a secular day is estopped, as against a *bona fide* holder for value, to show that it was made on Sunday.

ACTION on a promissory note made by the defendant and indorsed to plaintiff before maturity for value.

The answer alleged among other things that the note was made and delivered on a Sunday, and that it was therefore void under the law of Missouri, in which State it was made and delivered.

The court found as facts that the note was made and delivered to the payee on Sunday, but was dated on Saturday; that the plaintiff purchased it before due, in good faith and for a valuable consideration, without notice of any defense or any equities existing between the defendant and the payee. It therefore rendered judgment in plaintiff's favor for the amount claimed; from which defendant appealed.

Gerrit T. Thorn, for appellant, cited to the point that the note being made on Sunday was void. *Hill v. Sherwood*, 8 Wis. 343; *Melchoir v. McCarty*, 31 id. 252; *Smith v. City of Albany*, 7 Lana. 14; *Kepner v*

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Keefer, 6 Watts, 231; *Lyon v. Strong*, 6 Vt. 219; *Walls v. Van Ness*, 1 Hill, 76; *Northrup v. Foot*, 14 Wend. 248; *Rigney v. White*, 4 Daly, 400; 10 Ind. 386; 9 id. 112; 4 id. 619; 13 id. 565; 12 Mich. 378; 8 Minn. 41; 9 id. 194. If not dated on Sunday, evidence might be introduced to show the fact. *Bank v. Mayberry*, 48 Me. 198. The doctrine of estoppel has no place here, plaintiff not being shown to be a holder in good faith for value. The statute of Wisconsin controls, as the law of the place of performance must prevail. *Robinson v. Bland*, 2 Burr. 1077; Story on Conflict of Laws, 241, 242; *Thompson v. Ketchum*, 8 Johns. 189; Tay. Stats. 1954.

Raymond & Packard, for respondent. The note is not absolutely void in the hands of a *bona fide* purchaser for the reason that it was made and delivered on Sunday. When the consideration of a note arises out of a transaction prohibited by statute, the note is good in the hands of an innocent indorsee, unless the statute in express terms declares it to be void. *Moore v. Kendall*, 1 Chand. 83; Kyd on Exchange, 280-283; Story on Bills, §§ 188-190; Chitty on Bills, ch. 3, pp. 92, 93, 115, 116; *Lowes v. Mazzareda*, 1 Starkie, 385; *Wyatt v. Bulmer*, 2 Esp. 538; 3 Kent, § 44, pp. 79, 80; Bayley on Bills, ch. 12, pp. 512-521; *Gould v. Armstrong*, 2 Hall, 266; *Vallott v. Parker*, 6 Wend. 615; *Swift v. Tyson*, 16 Pet. 15-22. There was no proof as to what the Sunday laws of Missouri are, and the courts will not take judicial notice of the laws of a sister State. *Rape v. Heaton*, 9 Wis. 328; *Walsh v. Dart*, 12 id. 635. Nor is there any presumption in this case that the Missouri law is the same as our own. *Hull v. Augustine*, 33 Wis. 383; *Cutler v. Wright*, 22 N. Y. 472. The defendant is estopped from setting up the alleged illegality as against an innocent holder. *Chynoweth v. Tenney*, 10 Wis. 397; *Racine County Bank v. Lathrop*, 12 id. 466.

COLE, J. [After deciding some unimportant questions.] The court found that the note was actually made and delivered on Sunday, but was dated on Saturday. This execution of the note on Sunday, it is insisted, renders it void, even in the hands of an innocent indorsee. In *Hill v. Sherwood*, 3 Wis. 343, it was decided that a contract made on Sunday was invalid, and would not be enforced in a court of law. We have no intention to question or disturb that decision. For we hold this rule, that where a party makes and puts in circulation a negotiable note purporting to be made and bearing date on some secular day, he is estopped, as against an innocent holder, from showing that it was actu-

ally executed and delivered on Sunday. We cannot well conceive of a stronger case for the application of the doctrine of estoppel than such a case presents.

By the Court. — The judgment of the Circuit Court is affirmed.

CLEAVER V. CLEAVER.

(39 Wis. 96).

Will — wife not "relation" of husband.

A wife is not a relation of her "husband" within a statute saving from lapse a devise to a "child or other relation" of the testator's who dies before the testator.

APPEAL from the Circuit Court for Milwaukee county. This case arises upon an order of distribution made by the County Court of Milwaukee county, in the estate of William L. Cleaver. The testator was twice married, and had three children by his first wife, and three by his second: the latter being the appellants in this case, and the former the respondents.

By his will, made after his second marriage, the testator, after giving specific legacies to each of his children by his first wife, gave and bequeathed all the residue of his estate, real and personal, to his second wife.

The wife having died several months prior to her husband, leaving the appellants, her issue, surviving, the County Court, in making distribution of the estate, decreed that the residue thereof did not pass under will to her issue, but should be distributed equally among all the testator's children. This order was affirmed by the judgment of the Circuit Court, from which this appeal is taken.

Sec. 29, ch. 97, R. S. 1858, reads as follows: "When a devise or legacy shall be made to any child or other relation of the testator, leaving issue who shall survive the testator, such issue shall take the estate so given by the will, in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition shall be made or directed by the will."

L. S. Dixon, for appellants, argued that the construction placed upon the statute by the County Court would entirely frustrate the intention of the testator; that the word "relation," as universally understood in common conversation and ordinary usage, and as defined by lexicog-

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raphers and writers upon the meaning and use of English words, includes connection by affinity or consanguinity (Webster's Dic. ; Crabb's English Syn. ; 1 Black. Com. 434); that the statute should receive a liberal construction (*Paine v. Prentiss*, 5 Metc. 396 ; *Farrington v. Wilson*, 29 Wis. 383) ; that the construction given to the word "relations," when used in connection with bequests in a will, is an arbitrary one, founded upon necessity, and resorted to for the purpose of avoiding the uncertainty which would attend such bequests if construed in a literal and extended sense (*M' Neilledge v. Galbraith*, 8 Serg. & R. 43, 45 ; *Same v. Barclay*, 11 id. 103, 105 ; Redf. on Wills, Part II, 409 ; *Huling v. Fenner*, 9 R. I. 410 ; *Varrell v. Wendell*, 20 N. H. 431 ; *Raynor v. Mowbray*, 3 Bro. C. C. 234) ; that the reason of the rule or restriction ceases where, as in this case, the devisee or legatee is specifically named, and a construction according to ordinary usage can give rise to no difficulty or uncertainty whatsoever ; that the decisions under a similar statute of Massachusetts follow those of the English courts, guided by the rule as to who would be distributees, under the laws of that country, in case of intestacy, and should govern only so far as their reasoning convinces ; and that even if that rule is to be followed, and the term restricted to those who would take as distributees in case of intestacy, it would still include the wife, as she is entitled, under our statute, to an equal share with the children of an intestate. R. S., ch. 99, § 1, subd. 6 ; ch. 92, § 1, subd. 2 ; ch. 61, Laws of 1868 ; ch. 121, Laws of 1870 ; 2 Tay. Stats. 1170, § 1, subd. 2 ; *Tyler v. Tyler*, 19 Ill. 151.

James G. Jenkins, for respondents. 1. The legacy can be sustained only upon the theory that the wife is a relation of the husband within the intent of the statute. The word "relatives," in the construction of wills, is applied ordinarily to persons in the line of consanguinity, and not to connections by marriage ; and in Massachusetts, from whose statute ours is copied, it has been expressly held that a wife is not a relation within the meaning of the statute. *Elmsley v. Young*, 2 Myl. & K. 92 ; *Cooper v. Denison*, 13 Sim. 290 ; *Davies v. Baily*, 1 Ves. Sr. 84 ; *Maitland v. Adair*, 3 Ves. Jr. 231 ; *Harvey v. Harvey*, 5 Beav. 134 ; *Worseley v. Johnson*, 3 Atkyns, 758 ; *Storer v. Wheatley's Ex'rs*, 1 Penn. St. 506 ; *Esty v. Clark*, 101 Mass. 36 ; S. C., 3 Am. Rep. 320 ; *Kimball v. Story*, 108 id. 382 ; 2 Jarman on Wills, 45 ; 2 Williams on Ex'rs, 1004 ; Roper on Legacies (2d Am. ed.), 117 ; *Varrell v. Wendell*, 20 N. H. 432 ; *Dickens v. R. R. Co.*, 23 N. Y. 158 ; *Drake v. Gilmore*, 52 id. 889.* 2. In the construction of this statute, the doctrine of *noscitur a sociis* may properly be applied, and this would restrict the

term "other relations" to those standing in the order of child, as grandchild, etc., in the direct descending line, and proceeding from the body of the testator. Broom's Leg. Max. 451; *Morse v. Ins. Co.*, 30 Wis. 534; S. C., 11 Am. Rep. 587; Potter's Dwarria, 184, 236, 292; *Chegaray v. Jenkins*, 3 Sandf. 413; *Chegaray v. The Mayor, etc.*, 13 N. Y. 229.

RYAN, C. J. The testator's wife having died before him, there is no doubt that his bequest to her lapsed (2 Redfield on Wills, 284), unless it comes within sec. 29, ch. 97, R. S. And the sole question in this case is whether a wife is a relation of her husband within the meaning of the provision.

Relation, in this use, is a very indefinite word, which has often perplexed courts. In a broad sense, there are relations by affinity as well as by consanguinity. Jacobs' Dic., "Consanguinity;" 1 Black. 434. And in this sense, we should find it difficult to concur in the position that a wife is not a relation of her husband. *Storke v. Wheatley's Ex'rs*, 1 Penn. St. 506. As great a jurist as GIBSON, C. J., suffered himself to say in that case: "A wife is not related to her husband in any respect. Of his connection with her family, she is the link or *commune vinculum*; but so far is she from being connected with him as a relation, that her civil existence is melted into his, and they together form one person. A wife, therefore, is no more a relation or connection of her husband, than the husband is a relation or connection of himself." That seems carrying a theory of the common law *ad absurdum*; a paradox which would make the homicide of the wife by the husband appear to partake of the nature of suicide rather than of murder, and the adultery of the wife rather the husband's own offense than hers against him. But though the common law adopted the maxim *vir et uxor sunt unica persona, quia caro una et sanguis unus*, yet that was very much *cum sit vir caput mulieris* (Co. Litt. 112 a), and was largely in regard of rights of property and action. For many purposes, the common law truly recognized two persons in marriage, distinct and bearing to each other the nearest of all human relations. Bacon's, Peterdorff's, Dane's Abr., "*Baron and Femme*." The startling position, shocking all human understanding, that the wife is not a relation of the husband, seems to have arisen from the language of Lord HARDWICKE in *Worsely v. Johnson*, 3 Atkyns, 758, which the chancellor rests on his previous decision in *Davies v. Bailey*, 1 Vesey, Sr. 84, forgetting that he had said in the latter case, decided on another point, "It cannot be said that there is no relation between the husband and wife; but the question is, whether there be

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such a relation as is here meant." And that is the precise question in the construction of the statute before us.

The section in question seems to have been taken in 1849 from Massachusetts. There does not appear to have been then any construction of it in that State. But the subsequent decisions of *Esty v. Clark*, 101 Mass. 36; S. C., 3 Am. Rep. 320, and *Kimball v. Story*, 108 id. 382, though not binding upon us, ought to have great weight. And it is satisfactory that our own conclusion is the same.

The word "relation" was perhaps unfortunately used in the section, because it is in itself indefinite. But there had fortunately been a uniform line of decisions, extending through more than a century, before the section was adopted here, which confined the word used in bequests, to relations by blood, and made it virtually equivalent to kindred. *Brown v. Brown*, ruled by Lord MACCLESFIELD, and cited in *Thomas v. Hill*, *infra*, and other cases, was perhaps the first case on the point, but we cannot find it reported. *Anonymous*, 1 P. Wms. 327; *Thomas v. Hill*, Cases Temp. Talbot, 251; *Harding v. Glyn*, 1 Atkyns, 469; *Att'y Gen. v. Burkland*, apparently not reported, but cited in *Goodings v. Goodings*, 1 Vesey, Sr. 231, and in a note to *Edge v. Salisbury*, Ambler, 70; *Davies v. Baily*, 1 Vesey, Sr. 84; *Worseley v. Johnson*, 3 Atkyns, 758; *Whithorns v. Harris*, 2 Vesey, Sr. 527; *Isaac v. Defriez*, Ambler, 595; *Green v. Howard*, 1 Brown's C. C. 31; *Hands v. Hands*, apparently not reported, cited in *Philips v. Garth*, 3 Brown's C. C. 69, and in other cases; *Spring v. Biles*, 1 Term, 435; *Stamp v. Cooke*, 1 Cox, 234; *Rayner v. Mowbray*, 3 Brown's C. C. 234; *Maitland v. Adair*, 3 Vesey, 231; *Devisme v. Mellish*, 5 id. 529; *Jones v. Colbeck*, 8 id. 38; *Mahon v. Savage*, 1 Sch. & Lef. 111; *Crunoys v. Colman*, 9 Vesey, 319; *Doe v. Over*, 1 Taunton, 263; *Pops v. Whitcombe*, 3 Merivale, 689; *Smith v. Campbell*, Cooper, 275; 19 Vesey, 400; *Wright v. Atkins*, Turner & R. 143; *McNeilledge v. Barclay*, 11 Serg. & R. 103; *Harvey v. Harvey*, 5 Beavan, 134; *Storer v. Wheatley's Ex.*, 1 Penn. St. 506; *Varrell v. Wendell*, 20 N. H. 431. See also Comyn's Dig., App., "Devise of personal property," 30, 31, 32; 2 Jarman, 45; 1 Roper's Leg. 117; 2 Williams' Ex. 957; 2 Redfield on Wills, 409. There are probably other cases to the same effect; but we have been unable to find any qualifying the effect of those cited, which were all prior to the passage of our statute. There are subsequent cases, English and American, besides those in Massachusetts, *supra*, to the same purpose, which we do not think it necessary to quote. Those cited all proceed upon the necessity of limiting the indefinite sense of the word "relations" limit it by the statute of distributions to kindred; and determine not

only the degrees of relation, but the kind also, that it is by consanguinity. Such an unbroken series of decisions for nearly a century and a half appears to us conclusive of the construction of the word applied to wills, as used in the statute. R. S., ch. 5, § 1, subd. 1. They warrant us to apply the language of Lord THURLOW in *Raynor v. Mowbray*. "If it was a recent matter, there might be a doubt; but . . . when once a rule has been laid down, it is best to abide by it. We cannot always be speculating what would have been the best decision in the first instance."

This view would control our construction; but there is another which appears also to be conclusive. The words of the statute are, "child or relation." *Noscitur a sociis*. Child or other relation must signify child, or other relation of like character as a child; that is, other relation of the testator's blood. "When particular words are followed by general ones, the latter are to be held as applying to persons and things of the same kind as those which precede." Potter's Dwarria, 236, 292; Broom's Leg. Max. 450; *Morse v. Ins. Co.*, 30 Wis. 534; *Att'y-Gen. v. R. R. Companies*, 35 id. 425; *Chegaray v. Jenkins*, 3 Sandford, 409. In the latter case, the statute construed had the words "Incorporated Academy or other seminary of learning." And the court says: "The maxim *noscitur a sociis* appears to be applicable here, and to limit the exemption from taxation to such seminaries alone as are incorporated." We cannot doubt the effect of the word "other," in this statute, or the intention of the legislature to use the phrase "other relation," in the sense of kindred.

The law has always favored blood in the descent of estates. The particular provisions of our statutes in favor of the wife are personal to her, and tend rather to exclude than to include her in the term "relations," as used in the section. *Green v. Howard*, *supra*. In saving bequests from lapsing by the death of the devisee or legatee before the testator, the legislative intention appears to have been to save them only to the kindred of the testator, to the issue of the devisee or legatee only when the issue is of the testator's blood as well as the devisee or legatee. Therefore the statute is so framed as to exclude bequests to a stranger or the wife, because the issue of the one could not, and the issue of the other might not, be of the testator's blood. When the wife's issue is the husband's also, it seems to have been presumed that the will itself would provide for them without necessity of statutory protection. But when the issue of the wife is not the issue of the husband, we can perceive no reason, in or out of the statute, for saving a personal bequest to her from lapsing, which would not apply, though with perhaps less force, to a personal bequest to a stranger.

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In the present peculiar case, the rule seems to work a hardship; but we must apply the general principle. In such circumstances as these, the natural feeling of the elder children should afford that protection to the younger, which courts cannot give without violation of judicial rule. And we can say of this case, as the court of Pennsylvania said of another: "It is an unfortunate case, but the law is clear. The legacy lapsed by the death of the legatee in the life of the testator." The statute "does not reach the present case, and we are sorry for it." *Dickinson v. Purvis*, 8 Serg. & R. 71.

By the Court.—The judgment of the court below is affirmed.

JOLIFFE V. THE MADISON MUTUAL INSURANCE COMPANY.

(39 Wis. 111.)

Insurance — condition avoiding policy for non-payment of premium note — waiver of.

A policy of insurance contained the condition that "whenever a promissory note shall be taken for the cash premium, the policy in all such cases shall be issued upon the express condition that if said note is not paid within sixty days after the same shall become due, thereafter all obligations of the company to the insured shall be suspended until such time as the said note shall be fully paid." A loss occurred while a note given for a portion of the cash premium remained unpaid for more than sixty days after due. *Held*, (1) that the condition was valid, but (2) that it was waived by defendant's accepting after notice of loss, the amount due on the note.

ACTION on a policy of insurance against fire issued by the defendant to the plaintiff's testator on May 12, 1870, for a term of five years. The property was burnt in February, 1872.

The cash premium of \$16.50 payable when the policy was issued was not paid at that time, but the plaintiff's testator gave his note therefor due January 1, 1871. He also gave the usual premium note for \$33, payable on call of the directors of the company. The note for the cash premium, not being paid at maturity, was sued, and judgment obtained thereon, a portion of which was paid before the loss. After the loss, and after the defendant had notice thereof, the balance of the judgment was paid to and accepted by the defendant without objection or reservation.

There was no controversy in respect to the loss, or the amount and proofs thereof. The circuit judge held, that receiving the unpaid balance of the cash premium after notice of the loss was a waiver of the default in paying the same, estopping the defendant from asserting that its liability on the policy was suspended when the loss occurred.

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The defendant appealed from the judgment entered pursuant to such verdict.

B. E. Hutchinson, for appellant, argued, 1. That if any liability attached under the policy, it was at the moment of loss, and that by the express terms of the contract the liability of the company was suspended at that time, and the effect of the receipt of the balance of the cash premium was simply to cause the policy to re-attach from the date of the receipt, and not to waive the condition. *Cardwell v. Republic Ins. Co.*, Chi. Leg. News, May 22, 1875; *Williams v. Ins. Co.*, 19 Mich. 451; *Wall v. Ins. Co.*, 36 N. Y. 157; *Reed v. Aetna Ins. Co.*, Court of Appeals of N. Y., cited in 19 Mich. 451. 2. The assured, as a member of a mutual company, was chargeable with notice of its by-laws; and besides, he had actual notice of the penalty for non-payment of the assessment. Upon the question of assessments, see 51 Penn. St. 402; *Kelly v. Troy Ins. Co.*, 3 Wis. 254; *Atlantic F. Ins. Co. v. Saunders*, 36 N. H. 252; *Ins. Co. v. Paige*, 1 Hilt. 430; *Coles v. Ins. Co.*, 18 Iowa, 425. 3. The forfeiture of his policy for non-payment of an assessment does not relieve the assured from his liability to pay the assessment. *Iowa St. Ins. Co. v. Prosser*, 11 Iowa, 115; *Beadle v. Ins. Co.*, 3 Hill, 161; 6 Cranch, 192. How then can its receipt after forfeiture be a waiver? 4. The charter expressly authorizes the executive committee to act "without the presence of the board." And its act in this case became that of the board by ratification. *Howard Ins. Co. v. Ins. Co.*, 22 Conn. 394; *Atlantic F. Ins. Co. v. Saunders*, *supra*; 25 Barb. 146.

Wm. F. Vilas, for respondent, to the point that the defendant, by receiving the balance of the cash premium with full knowledge of the loss, had waived any forfeiture which might have been incurred by non-payment, cited *Wing v. Harvey*, 27 Eng. L. & Eq. 140; *N. Berwick Co. v. Ins. Co.*, 52 Me. 336; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; May on Ins., §§ 361-3. He further argued that the executive committee had no power to annul the policy; and that, even if it had been properly annulled, the company had waived all by its subsequent acts in receiving the cash premium and assessment, sending out to the insured, blanks to prove the loss, and placing its refusal to pay solely on the ground that the cash premium note had not been paid.

Lyon, J. The application for insurance upon the property covered by the policy in suit, signed by the plaintiff's testator, contains the following condition, which is part of the contract of insurance, viz.: "When

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ever a promissory note shall be taken for the cash premium, the policy in all such cases shall be issued upon the express condition that if said note is not paid within sixty days after the same shall become due, thereafter all obligations of the company to the insured shall be suspended until such time as the said note shall be fully paid." The loss occurred while a portion of the cash premium, for which a note had been given, remained unpaid, and more than sixty days after such note became due. It occurred, therefore, at a time when, by the terms of the contract of insurance, the liability of the defendant company on the policy was suspended. This stipulation in the contract is not prohibited by statute, and is not against public policy. On the contrary, it is fair and reasonable that the insurer should be relieved from liability while the insured is in default in respect to payments of premiums, and like stipulations in insurance contracts have been enforced in numerous cases, among which are the following: *Baker v. Union Mutual Life Ins. Co.*, 43 N. Y. 283; *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 500; *Wall v. Home Ins. Co.*, 36 N. Y. 167; *Williams v. Albany City Ins. Co.*, 19 Mich. 451; *Beadle v. Chenango Co. Mut. Ins. Co.*, 3 Hill, 161. Other cases to the same effect will be found cited in *Gorton v. Dodge Co. Mut. Ins. Co.*, decided herewith. Hence, there can be no recovery unless the defendant has waived the above condition. The condition was inserted in the contract for the benefit of the defendant, and manifestly it was competent for the defendant to waive it. Has it done so? The only act of the defendant which is relied upon as such waiver, is the receipt by it of the unpaid balance of the cash premium, after the loss. The precise question is, therefore, was the receipt of such balance by the defendant, after notice of the loss, a waiver of the condition of the contract by which the liability of the defendant on the policy was suspended when the loss occurred?

Had the agreement been that in case of default the whole cash premium should be considered earned, and that the liability of the insurer should be suspended, or the policy be void, until such premium, or the note given therefor, should be fully paid, we should have but little difficulty with the question. In such case, the insurer, having earned the premium, would be entitled to receive it in any event. If paid during the life of the policy, it would revive the risk from the date of payment as to all of the insured property remaining at that date; if not paid during the life of the policy, the insurer would be entitled to it, and might recover it by action. The premium would not, under such an agreement, cover any portion of the time during which the liability of the insurer was suspended. If the insurer accept the premium after default, such

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acceptance is not inconsistent with the claim that liability on the policy was suspended during default, and could not possibly mislead the insured to his prejudice. The insured pays and the insurer accepts just what the former is liable to pay and the latter is entitled to receive in any event, and the transaction lacks every essential element of a waiver or of an estoppel *in pais*. See cases above cited, particularly *William v. Ins. Co.*, 19 Mich. 451; S. C., 2 Am. Rep. 95.

But this is not such a case. The stipulation in the contract before us is not that upon default for sixty days in the payment of the note given for the cash premium, such premium shall be considered earned, and therefore payable absolutely; but it is merely that the liability of the defendant shall be suspended from sixty days after the note became due until the same should be fully paid. The whole cash premium had not been earned when the defendant's liability on the policy was suspended, but only a *pro rata* portion of it. Neither did the premium run during the suspension; for risk and premium go hand in hand, and one ceasing, the other also ceases. A writer on this subject, speaking of the contract of insurance, says: "It is, moreover, a conditional contract; for when no risk attaches no premium is to be paid, or, if paid, must, in the absence of fraud, be returned to the assured. In point of fact, the contract is to pay the premium on condition that the risk is run, and the refunding a premium is of frequent occurrence in maritime insurance; and that, too, in cases where it is entirely optional with the assured whether the property insured shall be put at hazard or not, as when the ship is never dispatched by the owner on the projected voyage. The language of Lord MANSFIELD in *Tyrie v. Fletcher*, Cowp. 668, is explicit: 'When the risk has not been run, whether its not having been run was owing to the fault, pleasure or will of the insured, or to any other cause, the premium shall be returned.' And this principle is alike applicable to all policies of insurance." May on Insurance, § 4.

Applying these principles to the present case, it necessarily results, that at the expiration of sixty days from the time the note given for cash premium became due, the liability of defendant on the policy ceased, and, without restoring such liability, the latter was entitled to receive on such note what the policy had earned while in force, and it could have refused to receive any sum in excess of what the policy had so earned. But the defendant received the whole cash premium for which the note was given. By so doing, it received compensation for the risk covering the time when the loss occurred, and we think that it cannot now be heard to allege that at the time of the loss it had no risk on the property insured. The acceptance of the full premium after notice of the loss is entirely incon-

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sistent with the claim that the risk was suspended when the loss occurred.

We conclude, therefore, in view of the peculiar terms of the contract, that the acceptance of the cash premium, after default and notice of the loss, operated as a waiver of the suspension clause therein, and renders the defendant continuously liable on the policy the same as though the note for cash premium had been paid when due.

The remainder of the opinion is not important.

The foregoing views dispose of the case. The defendant having waived the stipulation that the risk should be suspended on default being made for more than sixty days in payment of the note given for the cash premium, and the policy not having been declared void or annulled for non-payment of the assessment on the premium note, the circuit judge properly directed the jury to find for the plaintiff; and the judgment of the Circuit Court must be affirmed.

By the Court. — Judgment affirmed.

KIRK V. THE DODGE COUNTY MUTUAL INSURANCE COMPANY

(39 Wis. 138.)

Negotiable instrument — negotiability.

A promissory note given for the premium on a policy of insurance, which was otherwise negotiable, contained a memorandum that if the maker failed to pay it at maturity the whole amount of the premium on the policy should be considered earned and the policy void. *Held*, that the memorandum did not affect its negotiability, and that it was entitled to grace.

ACTION on a policy of insurance against fire issued by defendant to plaintiff, January 12, 1875. The property insured was burned February 14, 1875.

The defendant alleged as a defense the execution by plaintiff of the instrument set forth in the opinion and the plaintiff's failure to pay the same according to its terms on Feb. 12th, 1875, and that in consequence of such failure the policy became null, void, and so remained at the time of the loss. Plaintiff demurred to the answer, and from an order sustaining the demurrer defendant appealed.

Dixon, Hooker & Palmer (L. S. Dixon, of counsel), for appellant, to the point that the condition annexed to the note destroyed its negotiability, and therefore no days of grace existed, cited *Robert v. Ins. Co.*, 1 Bigelow's L. & A. Ins. R. 644; S. C., 1 Disney, 355; 1 Parsons on B.

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& N. 45; *Martin v. Chauntry*, 2 Strange, 1271; *Knight v. W. & M. R. R. Co.*, 1 Jones' Law (N. C.), 357; *Barnes v. Gorman*, 9 Rich. Law, 297; *Wallace v. Dyson*, 1 Spears' Law, 127; *Austin v. Burns*, 16 Barb. 643; *Hubbard v. Mosely*, 11 Gray, 170; *American Ex. Bank v. Blanchard*, 7 Allen, 333; *Blake v. Coleman*, 22 Wis. 415; *Overton v. Tyler*, 3 Penn. St. 346; *Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 67; S. C., 13 Am. Law Reg. (N. S.) 610; 4 Bigelow's L. & A. R. 384, 390; *Zimmerman v. Anderson*, 67 Penn. St. 421; 5 Am. Rep. 447; *Arnold v. R. R. Co.*, 5 Duer, 207.

Cousins & Hoyt (*H. Cousins*, of counsel), for respondent, contended that, the note being taken in payment of the premium, the policy took effect from delivery, and must continue in force until default in payment of the note at least, whatever might be the consequences of non-payment at maturity; that there could be no default until the note became due (*Mutual Life Ins. Co. v. French*, 2 Cin. Sup. Ct. R. 321; *Pitt. v. Ins. Co.*, 100 Mass. 500; *Goit v. Ins. Co.*, 25 Barb. 189); and that the note was negotiable and entitled to grace. 2 Bouv. Law Dic. 392; *Wall v. Ins. Co.*, 36 N. Y. 158; *Alliance Mut. Ins. Co. v. Swift*, 10 Cush. 533; *Cary v. Nagel*, 2 Biss. 244; *Frost v. Ins. Co.*, 5 Denio, 154; *Bull v. Sims*, 23 N. Y. 570; *Sanders v. Bacon*, 8 Johns. 485; *Cota v. Buck*, 7 Metc. 588; *Hodges v. Shuler*, 22 N. Y. 114; *Taylor v. Curry*, 109 Mass. 36; *Bank of Washington v. Triplett*, 1 Pet. 25; *Hopping v. Quin*, 12 Wend. 517; R. S., ch. 60, § 5.

COLE, J. The question in this case is, whether an instrument of which the following is a copy, is a negotiable promissory note :

"\$40.00. ARKANSAW P. O. E. N. Stillman, Agent. Pepin Co., Wis., Jan'y 12, 1875. On or before the 12th of February next, for value received, I promise to pay to the Dodge County Mutual Insurance Co. or order, at their office in Waupun, Wis., forty dollars for premium for insurance policy No. 2,193 in said company.

"And it is further agreed that if this note be not paid at maturity, the whole amount of premium on said policy shall be considered as earned, and the policy be null and void so long as this note remains overdue and unpaid. Interest at the rate of ten per cent. per annum until paid. W. G. KIRK."

If the above is a negotiable promissory note, it was not due when the property insured was destroyed by fire on the 14th of February, 1875, and the company is responsible for the loss.

It seems to us there can be no doubt about the character of the in-

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strument. It has all the essential qualities of a promissory note as defined in the books. It is a promise to pay to the order of the company a specified sum of money, at a fixed time; the payment not dependent on any contingency, nor payable out of a particular fund. Says SHAW, C. J., in *Cota v. Buck*, 7 Metc. 588: "The true test of the negotiability of a note seems to be, whether the undertaking of the promisor is to pay the amount at all events, at some time which must certainly come, and not out of a particular fund, or upon a contingent event. If it were payable on a contingency, or out of a particular fund, it would not be negotiable." Whatever doubt might exist in that case as to whether the undertaking to pay was absolute and to be made within a certain limited time, there would seem to be no uncertainty upon any of those points in the case before us.

It is said, however, that the memorandum attached to the note is in the nature of a condition which destroys the negotiable character of the instrument. That memorandum in no degree qualifies the absolute promise of the maker to pay the note on or before the 12th day of February thereafter. The maker stipulates that if he fails to pay at the maturity of the note, the whole amount of premium on the policy shall be considered earned, and that while he should be in default the property would be at his own risk. This is the substance of the memorandum. But it does not affect or change the maker's liability on the note. That continues, though the policy may have become forfeited by his failure to pay at the time specified. The effect of such a memorandum on the rights of the insurer and insured is quite fully considered in *Williams v. Albany City Ins. Co.*, 19 Mich. 451; S. C., 2 Am. Rep. 95; though there the question was, whether the company was liable on the policy for a loss occurring during the default to pay the note. That, of course, is a different question from the one before us. Here the question is, whether the character of the instrument is affected by the memorandum attached. And we perceive no ground for holding that it is. The case of *Blake v. Coleman*, 22 Wis. 415, is clearly distinguishable from the one at bar. See *Ward v. Perrigo*, 33 Wis. 148; *Sanders v. Bacon*, 8 Johns. 485; *Hodges v. Shuler*, 22 N. Y. 114.

We think the order of the Circuit Court, sustaining the demurrer to the answer, is correct, and must be affirmed.

By the Court.—Order affirmed.

MATTER OF GOODELL.

(39 Wis. 232.)

Attorney and counsel — admission of women to the bar.

Where the statute relating to the admission of attorneys applied in terms to males only, held, that it would not be construed to include females because of the statutory rule of construction that "words of the masculine gender may be applied to females."

MOTION for the admission of Miss R. Lavinia Goodell to the bar of the Supreme Court. A certificate was presented showing that Miss Goodell had been upon due examination admitted to the Circuit Court of Rock county.

The statutes of Wisconsin relating to admissions to the bar are as follows (Tay. Stats. 1843-4, §§ 31-33, which are the same as §§ 1-3, ch. 189, Laws of 1861):

"§ 31. No person shall hereafter be admitted or licensed to practice as an attorney of any court of record in this State, except in the manner hereinafter provided.

"§ 32. To entitle any such person to practice as such attorney in the Circuit Courts of this State, he shall be first licensed by order of one of the judges thereof, made in open court; and no such order shall be made until the person applying for such license shall have first been examined in open court, by the judge thereof, or examiners by him appointed, as to his learning in the law and ability to practice as such attorney, nor until such judge shall be satisfied that such person possesses a sufficient legal knowledge and ability to entitle him to practice as such attorney, nor unless such person be resident of this State, more than twenty-one years of age, and of good moral character. His residence and age must be made to appear by his affidavit.

"§ 33. Any person licensed by order of the court, as provided by section 2 of this act [§ 32], shall be entitled to practice as attorney of any court of record of this State except the Supreme Court; and to entitle any person to practice as attorney in the Supreme Court, he shall first be licensed by order of such court."

L. C. Sloan, for the motion, read an argument prepared by the applicant.

RYAN, C. J. In courts proceeding according to the course of the common law, a bar is almost as essential as a bench. And a good bar may be said to be a necessity of a good court. This is not always understood,

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perhaps not fully by the bar itself. On the bench, the lesson is soon learned that the facility and accuracy of judicial labor are largely dependent on the learning and ability of the bar. And it well becomes every court to be careful of its bar and jealous of the rule of admission to it, with the view of fostering in it the highest order of professional excellence.

The Constitution makes no express provision for the bar. But it establishes courts, amongst which it distributes all the jurisdiction of all the courts of Westminster Hall, in equity and at common law. *Putnam v. Sweet*, 2 Pin. 302. And it vests in the courts all the judicial power of the State. The constitutional establishment of such courts appears to carry with it the power to establish a bar to practice in them. And admission to the bar appears to be a judicial power. It may, therefore, become a very grave question for adjudication here, whether the Constitution does not intrust the rule of admission to the bar, as well as of expulsion from it, exclusively to the discretion of the courts.

The legislature has, indeed, from time to time, assumed power to prescribe rules for the admission of attorneys to practice. When these have seemed reasonable and just, it has generally, we think, been the pleasure of the courts to act upon such statutes, in deference to the wishes of a co-ordinate branch of the government, without considering the question of power. We do not understand that the Circuit Courts generally yielded to the unwise and unseemly act of 1849, which assumed to force upon the courts as attorneys, any persons of good moral character, however unlearned or even illiterate; however disqualified, by nature, education or habit, for the important trusts of the profession. We learn from the clerk of this court that no application under that statute was ever made here. The good sense of the legislature has long since led to its repeal. And we have too much reliance on the judgment of the legislature to apprehend another such attempt to degrade the courts. The State suffers essentially by every such assault of one branch of the government upon another; and it is the duty of all the co-ordinate branches scrupulously to avoid even all seeming of such. If, unfortunately, such an attack upon the dignity of the courts should again be made, it will be time for them to inquire whether the rule of admission be within the legislative or the judicial power. But we will not anticipate such an unwise and unbecoming interference in what so peculiarly concerns the courts, whether the power to make it exists or not. In the meantime, it is a pleasure to defer to all reasonable statutes on the subject. And we will decide this motion on the present statutes, without passing on their binding force.

This is the first application for admission of a female to the bar of this

court. And it is just matter for congratulation that it is made in favor of a lady whose character raises no personal objection: something perhaps not always to be looked for in women who forsake the ways of their sex for the ways of ours.

The statute provides for admission of attorneys in a Circuit Court upon examination to the satisfaction of the judge, and for the right of persons so admitted to practice in all courts here except this; but that to entitle any one to practice in this court he shall be licensed by order of this court. Tay. Stats., ch. 119, §§ 31, 32, 33. While these sections give a rule to the Circuit Courts, they avoid giving any to this court, leaving admission here, as it ought to be, in the discretion of the court. This is, perhaps, a sufficient answer to the present application, which is not addressed to our discretion, but proceeds on assumed right founded on admission in a Circuit Court. But the novel positions on which the motion was pressed appear to call for a broader answer.

The language of the statute, of itself, confessedly applies to males only. But it is insisted that the rule of construction found in subd. 2, § 1, ch. 5, R. S., necessarily extends the terms of the statute to females. The rule is that words in the singular number may be construed plural, and in the plural, singular: and that words of the masculine gender may be applied to females; unless, in either case, such construction would be inconsistent with the manifest intention of the legislature.

This was pressed upon us, as if it were a new rule of construction, of peculiar application to our statutes. We do not so understand it. It appears to be but a particular application of the general rule thus stated by TINDALL, C. J.: "The only rule for the construction of acts of parliament is, that they should be construed according to the intent of the parliament which passed the act." And it is not new or peculiar here. Potter's Dwarries, 111. The last clause of the rule, relating to sex, seems to be almost as old as Magna Charta. Coke, 2 Inst. 45. We apprehend that, unless in the construction of penal statutes, it has been little questioned since the much considered case of *King v. Wiseman*, Fortescue, 91. The rule is permissive only, as an aid in giving effect to the true intent of the legislature. Even of a statutory rule positive in terms, Lord DENMAN said: "It is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be included within a term, when the circumstances require that they should." *Queen v. Justices, etc.*, 7 A. & E. 480. So, *à fortiori*, of the permissive rule here.

And the argument for this motion is simply this: that the application

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of this permissive rule of construction to a provision applicable in terms to males only, has effect, without other sign of legislative intent, to admit females to the bar from which the common law has excluded them ever since courts have administered the common law. This is sufficiently startling. But the argument cannot stop there. Its logic goes far beyond the bar. The same peremptory rule of construction would reach all or nearly all the functions of the State government, would obliterate almost all distinction of sex in our statutory *corpus juris*, and make females eligible to almost all offices under our statutes, municipal and State, executive, legislative and judicial, except so far as the Constitution may interpose a virile qualification. Indeed the argument appears to overrule even this exception. For we were referred to a case in Iowa, which unfortunately we do not find in the reports of that State, holding a woman not excluded by the statutory description of "any white male person." If we should follow that authority in ignoring the distinction of sex, we do not perceive why it should not emasculate the Constitution itself and include females in the constitutional right of male suffrage and male qualification. Such a rule would be one of judicial revolution, not of judicial construction. There is nor sign nor symptom in our statute law of any legislative imagination of such a radical change in the economy of the State government. There are many the other way; an irresistible presumption that the legislature never contemplated such confusion of functions between the sexes. The application of the permissive rule of construction here would not be in aid of the legislative intention, but in open defiance to it. We cannot stultify the court by holding that the legislature intended to bring about, *per ambages*, a sweeping revolution of social order, by adopting a very innocent rule of statutory construction.

Some attempt was made to give plausibility to the particular construction urged upon us, founded on ch. 117 of 1867, and ch. 79 of 1870. It was represented that the former admits women to every department of the university, excepting the military only, and so necessarily including the law department; that the latter includes admission to the bar of the graduates of the law department; that the legislature had thus provided for the admission of female graduates of the law school, and ought therefore to be understood as intending the admission of women under the general statute. If the legislature had so provided for the admission of female graduates, we do not perceive how that could aid the construction of the general statute, or this lady, who does not appear to be a graduate. But, unfortunately for the position, the statutes were not stated with the fair accuracy which becomes counsel, and do not support it.

The act of 1867 is an amendment of section 4 of the act of 1866, reorganizing the university. The section of 1866 provided, without qualification, that "the university in all its departments and colleges shall be open alike to male and female students." The section of 1867 substitutes the provision that "The university shall be open to female as well as male students, under such regulations and restrictions as the board of regents may deem proper." In both statutes, the section provides that all able-bodied male students shall receive military instruction, and makes no other reference to a military department. And the argument that the admission of females under the statute of 1867, to all departments except the military, necessarily contemplated their admission to the law department, falls to the ground, because the statute neither mentions all departments nor excepts the military — if there be a military — department.

The inaccuracy is the more striking from the fact that the section of 1866 does expressly include all departments and colleges, and the amendment of 1867, evidently *ex industria*, omits them. The change of an absolute right of admission to all departments and colleges of the university in 1866, to admission to the university under discretionary regulations and restrictions of the regents in 1867, is very significant; the more so that it is the only amendment made. It seems likely that the legislature came to regard the absolute and indiscriminate right of 1866 as dangerously broad, and to consider it necessary to make the right subordinate to the judgment of the regents. And if the law school had then been established by statute, it would be very doubtful whether the admission of females to it would be sanctioned by the act of 1867. But there was no such statute; and the law school was in fact established, not by statute, but, as we learn, by the authorities of the university, some time in 1868, after the enactment of the section in both forms. The first class of students, all males, graduated in 1869, without color of right to practice. Hence the statute of 1870, to give the right, presumably passed without thought of the admission of females to the bar. And the general argument for this motion takes nothing by these statutes.

So we find no statutory authority for the admission of females to the bar of any court of this State. And, with all the respect and sympathy for this lady which all men owe to all good women, we cannot regret that we do not. We cannot but think the common law wise in excluding women from the profession of the law. The profession enters largely into the well being of society; and, to be honorably filled and safely to society, exacts the devotion of life. The law of nature destines and qualifies the female sex for the bearing and nurture of the children of

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our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. The cruel chances of life sometimes baffle both sexes, and may leave women free from the peculiar duties of their sex. These may need employment, and should be welcome to any not derogatory to their sex and its proprieties, or inconsistent with the good order of society. But it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours. There are employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the courtroom, as for the physical conflicts of the battle-field. Womanhood is moulded for gentler and better things. And it is not the saints of the world who chiefly give employment to our profession. It has essentially and habitually to do with all that is selfish and malicious, knavish and criminal, coarse and brutal, repulsive and obscene in human life. It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and slander of sex, impotence, divorce: all the nameless catalogue of indecencies, *la chronique scandaleuse* of all the vices and all the infirmities of all society, with which the profession has to deal, and which go toward filling judicial reports which must be read for accurate knowledge of the law. This is bad enough for men. We hold in too high reverence the sex without which, as is truly and beautifully written *le commencement de la vie est sans secours, le milieu sans plaisir, et le fin sans consolation*, voluntary to commit it to such studies and such occupations. *Non tali auxilio nec defensoribus istis*, should juridical contests be upheld. Reverence for all womanhood would suffer in the public spectacle of woman so instructed and so engaged. This motion gives appropriate evidence of

this truth. No modest woman could read without pain and self abasement, no woman could so overcome the instincts of sex as publicly to discuss, the case which we had occasion to cite *supra*, *King v. Wiseman*. And when counsel was arguing for this lady that the word "person," in, § 32, ch. 119, necessarily includes females, her presence made it impossible to suggest to him as *reductio ad absurdum* of his position, that the same construction of the same word in § 1, ch. 37, would subject woman to prosecution for the paternity of a bastard, and in §§ 39, 40 ch. 164, to prosecution for rape. Discussions are habitually necessary in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety. If, as counsel threatened, these things are to come, we will take no voluntary part in bringing them about.

By the Court.—The motion is denied.

GRIFFITHS V. KELLOGG.

(39 Wis. 290.)

Negotiable instrument — signature obtained by fraud.

A person was induced without his negligence to sign a negotiable note by fraudulent representations that it was a different note, and for a less sum. *Held*, that he was not liable thereon to a *bona fide* holder for value.*

ACTION on a promissory note for \$76, alleged to have been made by the defendant Kellogg to the order of Gillespie Brothers, and by them indorsed to the plaintiff for value before maturity. The answer admitted the making of a note for \$47, but denied having executed any note for \$76. On the trial, defendant testified that the note was given for a lightning rod; that she had agreed with one Johnson, the agent, to give him a note for \$47 (the price of the rod), payable in six months or one year from the following fall; that he drew up a note for \$47, payable in six months, which she refused to sign; that he then drew another note and read it to her as for the same amount payable as agreed, which she signed; that she was unable to read without her glasses, which were at the house of a neighbor; that two of her children were at the time present who could read, but she did not ask them to

* See *Abbott v. Rose*, 16 Am. Rep. 427; *Chapman v. Rose*, 15 id. 401; *Cline v. Guthrie*, 13 id. 387; *Briggs v. Ewart*, 11 id. 445. and cases cited in note. *EXP.*

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read the note; that she never intended to execute a note for \$76, nor for any sum except \$47.

Plaintiff's evidence showed that he purchased the note for value before maturity and without knowledge of the circumstances stated by defendant.

The jury rendered a verdict for the defendant, and from a judgment thereon, plaintiff appealed.

E. F. Carpenter, for appellant.

Bennett & Sale, for respondent.

RYAN, C. J. We shall not attempt to examine the very many exceptions in this case, but will content ourselves with passing upon the questions arising on the record.

The question was very fully and fairly submitted to the jury, whether the respondent voluntarily made the note in suit, or whether her signature was procured to it by a fraud practiced upon her under pretense of getting her to sign a different note for a less sum which she really owed to the lightning-rod man. The jury found that the fraud was practiced upon her, and that she did not voluntarily make the note in suit. We entirely concur in the verdict. It is impossible to read the evidence without coming to regard the transaction as a fraudulent imposition upon the respondent. The note in suit was as little hers as if the transaction between her and the lightning-rod man had not taken place, and he had forged the note. If not forgery, it was akin to forgery. And the note so obtained is not the contract of the respondent. This is not an open question in this court. *Walker v. Ebert*, 29 Wis. 194; 9 Am. Rep. 548; *Kellogg v. Stainer*, 29 Wis. 626; *Butler v. Carns*, 37 id. 61; *Chipman v. Tucker*, 38 id. 43; *Roberts v. McGrath*, id. 52; *Roberts v. Wood*, id. 60.

It was, indeed, contended that this doctrine is not applicable to negotiable paper, when the maker is not deceived as to the nature of the paper, but only as to the amount or other details of it. But it has been frequently applied to negotiable paper in this court. See the cases cited *supra*. The language of DIXON, C. H., in *Walker v. Ebert*, approved in *Chipman v. Tucker*, explains the rule and the reason of the rule, and is conclusive of its application. "The inquiry in such cases goes back of all questions of negotiability or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is to show that it is not in law or in fact what it purports

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to be, namely, the promissory note of the supposed maker. For the purpose of setting on foot or pursuing this inquiry, it is immaterial that the supposed instrument is negotiable in form, or that it may have passed to the hands of a *bona fide* purchaser for value. Negotiability in such cases presupposes the existence of the instrument as having been made by the party whose name is subscribed; for, until it has been so made, and has such actual legal existence, it is absurd to talk about a negotiation, or transfer, or *bona fide* holder of it, within the meaning of the law merchant."

The protection of the law merchant to a *bona fide* holder of negotiable paper is not absolute. He runs the risk of the validity of the paper which he purchases, for which he relies not on the maker, but on his immediate indorser. And question might be made whether one who purchases commercial paper, at a great discount, from a stranger, whose name he does not well know, without indorsement, without inquiry within his power, as the appellant did, can always be held to be a *bona fide* purchaser.

Whether the respondent, being unable to read the paper which she signed, was guilty of negligence to estop her from setting up this defense against a *bona fide* purchaser, was fairly submitted to the jury, and answered by their verdict for her. The jury who gave the verdict, and the learned judge of the court below who refused a new trial, saw and heard the respondent and her children testify, and were better able to judge than we are whether her not appealing to her children for assistance was negligence under the circumstances. And even if we were disposed to think differently, we should not feel at liberty to disturb the verdict or the order denying a new trial, on that ground.

By the Court. — The judgment of the court below is affirmed.

**VAN SLYKE V. TREMPLEALEAU COUNTY FARMERS' MUTUAL FIRE
INSURANCE CO.**

(39 Wis. 390.)

Constitutional law — statute authorizing counselor to act as judge — mistrial.

A statute authorized actions in which the judge was interested or prejudiced to be tried by consent of the parties, before a counselor of the court. *Held*, that the statute was unconstitutional, that a person assuming to act under it was not even a judge *de facto*, and that his judgment was absolutely void.

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ACTION for a loss by fire, under an alleged agreement for insurance. Plaintiff presented to the court a petition representing that the judge, by reason of relationship to the parties, was insensibly prejudiced in the case; whereupon the parties stipulated for a trial before John J. Cole, Esq., a member of the bar of the Supreme Court.*

The bill of exceptions states that the action "came on for trial before John J. Cole, Esq., a counselor of the Supreme Court of this State, who sat as judge to try the case by stipulation of the parties, and a jury, at the April term of the court," etc.; and it is signed "JOHN J. COLE, Counselor, acting as Judge."

The plaintiff had a verdict and judgment; and the defendant appealed.

A. W. Newman, for appellant.

G. Y. Freeman, for respondent.

RYAN, C. J. Mere imputation of prejudice to the circuit judge, made in proper time by either party to a civil action, entitles the party making it to a change of the venue. Ch. 123, § 8, R. S., ch. 206 of 1862. With a view, doubtless, of mitigating such inconvenience, ch. 69 of 1870 authorizes the parties to avoid change of the venue on that ground, by stipulating that a member of the bar of this court shall act as judge in the cause, with all the powers and duties of the circuit judge.

Such a statute might work well. But we cannot consider it competent under the Constitution. That instrument vests all judicial jurisdiction in courts and justices of the peace, and provides for the election of judges of all courts; and the legislature can confer none on other officers or persons, excepting power not exceeding that of a circuit judge at chambers, on certain officers now called court commissioners. *Att'y-Gen. v. McDonald*, 3 Wis. 805; *Gough v. Dorsey*, 27 id. 119; *Conroe v. Bull*, 7 id. 408. So manifest is this intent to distribute and restrict the exercise of judicial authority by express grant, that the framers of the Constitution deemed it necessary to give express authority to the judge of one cir-

* Ch. 69, Laws of 1870, amended the statute directing a change of venue upon petition of a party showing prejudice of the judge, by adding thereto the following: "Unless the parties to said action, by themselves or their attorneys, shall make and file with the clerk of the court in which said cause is pending, a written stipulation agreeing that some member of the bar of the Supreme Court of Wisconsin act as judge in said cause; and in that case the place of trial of such action shall not be changed, but the party so agreed upon may act as judge in said cause, and shall have all the powers and perform all the duties of the judge of said court in said cause."

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cuit to hold court in another. The statute in question was well intended but obviously overlooked the constitutional restriction. It seems too manifest for discussion that, under the Constitution, no one can hold a Circuit Court but a circuit judge. Certainly not a court commissioner, who can only act as circuit judge at chambers. *A fortiori*, not one holding no judicial office: a gentleman of the bar assuming no judicial office, but merely chosen by the parties to an action to act as a sort of judicial arbitrator in it. If the statute before us could be upheld, we do not see why one could not wish should assume to give to the parties, in all actions, in all courts, power to stipulate the judges off the bench, and private persons into their seats. Judicial power is one of the attributes of sovereignty necessarily delegated in its exercise. The Constitution does not leave the delegation loose at the discretion of the legislature. It delegates the judicial power to constitutional courts, to be held by constitutional judges. And these constitutional judges take no power from the Constitution, can take none from the legislature, to subdelegate their judicial functions. See the instructive case on this subject of *Cohen v. Hoff*, 3 Brevard, 500.

The respondent petitioned the court below, representing the judge to be related to the parties and necessarily and insensibly prejudiced in the case, but not praying change of the venue. We give no opinion whether the petition properly raised the question of prejudice. The learned judge himself evidently thought that it did.

The parties thereupon filed a stipulation that Mr. Cole, a member of the bar of this court, should act as judge on the trial of the cause; and the court below made an order, reciting the petition for prejudice, and ordering the cause to be tried before Mr. Cole as judge of the court, in accordance with the statute.

The trial appears to have taken place before Mr. Cole and a jury, who found for the respondent. There is in the record what purports to be a bill of exceptions and an order refusing a new trial, signed by Mr. Cole. The judgment is signed by the clerk, with a statement at its head that Mr. Cole sat as judge on the trial.

We cannot look into the bill of exceptions or consider the order denying a new trial, because both are unofficial and devoid of judicial authority. They are as any other irrelevant papers finding their way by accident or mistake into the record of a cause. And the only question for us is, whether we should hold the judgment supported by a presumption that it rests upon a proper trial of the issue, or should consider it as rendered by Mr. Cole, and therefore not properly the judgment of the court below

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We cannot doubt that the latter is the proper view. All judgments are by the consideration of the court. *Judicia in deliberationibus mæstentur*. The judicial mind goes to all judgments, either by particular consideration or by general consideration established by rule. There must be actual or constructive consideration of the judge of the court. *Judicium est quasi juris dictum*. And it is the voice of the judge only which is the voice of the law. *Judex est lex loquens*. And we cannot close our eyes to the truth so patent in this record, that, in compliance with the statute before us, the learned judge of the court below abdicated his judicial office and function, for this cause, in favor of Mr. Cole. And it was by consideration of Mr. Cole, not of the circuit judge, that this judgment went. Indeed, with the suggestion uncontroverted that the judge was related to the parties, we do not see how he could well sit in the cause. R. S., ch. 123, § 7. Be that as it may, the record discloses that he left the bench and Mr. Cole took his place upon it, assumed his duties in the cause, and tried it; and that upon Mr. Cole's *quasi* judicial consideration and voice only, this judgment was rendered. It was literally *coram non judice*.

This phrase is commonly applied directly to the court itself. But it applies, in its proper sense, to a court not having jurisdiction of a matter, only because the judge is, *quoad hoc*, not a judge. And the judge *de jure et de facto* of a court not having jurisdiction of a cause in it, is, for that cause, like a private person assuming to exercise judicial functions over it. "When the court has not jurisdiction of the cause, there the whole proceeding is *coram non judice*, . . . and therefore the said rule . . . *qui jussu judicii aliquid fecerit* (but when he has no jurisdiction, *non est judex*) *non videtur dolo malo fecisse, quia parere necesse est*, was well allowed, but it is not of necessity to obey him who is not judge of the cause, no more than it is a mere stranger, for the rule is, *judicium a non suo judice datum nullius est momenti*." *Marshalls case*, 10 Rep. 68 b, 76 a; cited and approved in *Taylor v. Oleson*, 2 A. d. & E. (N. S.) 978. "It is the same as though there was no court. It is *coram non judice*." *Grannon v. Raymond*, 1 Conn. 40. So, because the jurisdiction of a court can be exercised only by the judge *de facto* of the court, the judge of a court not having jurisdiction is likened to a stranger assuming to exercise the jurisdiction of a court having it; the proceeding in both cases being *coram non judice*. The rule as given in *Fleta*, following *Bracton*, applies very closely to this case. It is there said, in substance, that no one can proceed judicially to whom regular jurisdiction has not been delegated by the king himself; and that no other can control the power of the county or punish for contempt (con-

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tumacy) except one on whom judicial power has been conferred, not by a judge, but by the king himself, for that even a *praetor* could not substitute judges under him, because the judgments of such would be of no effect.* *Sententia enim a non iudice lata nemini debet nocere.* Fleta, book 6, ch. 6, §§ 6, 7. So, we are told by Coke that even when the king personally sat in the King's Bench, "the judicature only belongeth to the judges of that court;" and that they "have supreme authority, the king himself sitting there as the law intends." And he calls them sovereign justices. 4 Inst. 73. If the king himself, sitting in his own court, held *coram ipso rege*, could not exercise its judicial power, surely no private subject of his could. "*Judicium* is derived *a jure et dicto, et est quasi juris dictum*" (3 Inst. 210); and it is only the appointed judge who can speak the authoritative word of the law. Mr. Cole might pronounce the law as well as any of us; it is not that he wanted ability, but that he wanted authority. His voice could not utter *juris dictum, quia non est iudex*. "He was not judge *de jure* or *de facto*, and therefore all his acts as such are void." *Frame v. Trebble*, 1 J. J. Marsh. 205. See Broom's Leg. Max. 69.

There is a quaint relish of poetry in the way of putting the sovereign delegation of judicial function in *Martin v. Marshall*, Hob. 68. "All kingdoms in their constitution are with the power of justice, both according to the rule of law and equity; both which, being in the king as sovereign, were after settled in several courts; as the light, being first made by God, was after settled in the great bodies, the sun and moon. But that part of equity being opposite to regular law, and in a manner an arbitrary disposition, is still administered by the king himself and his chancellor, in his name *ab initio*, as a special trust committed to the king, and not by him to be committed to any other." With all deference to that great judge, it might perhaps be suggested that here is a slight inaccuracy of constitutional law, celestial and terrestrial. For there does not appear to be any radical distinction in the delegation of equitable jurisdiction and of legal jurisdiction. Equity never rested in mere discretion of king or chancellor. And it is certainly contrary to the received notion, that the moon shines as a luminary *per se*, like the sun. Taking the sun and moon according to the common acceptation, and following Hobart's metaphor, the circuit judge might be likened to the sun of the court below, in this cause, and Mr. COLE to the moon, after

* Nullus summ' potest cui jurisdictio ordinaria per ipsum Reg' non delegatur, nec alius coercionem com' habebit, nec contumaciam punire poterit quis nisi ipse cui datur iudic' auctoritas et non per iudicem delegatum sed per ipsum Reg'; Praetor enim iudic' sibi non poterit subdelegare, quia sententiae talis nullius sunt effectus.

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the fashion of a juridical depute in Scot's law, shining with delegated jurisdiction. But the constitution mars the comparison. For by the astronomical constitution the sun appears to take power to delegate his functions of lighting the world; while the State Constitution tolerates no such delegation, and appoints a sun only, without any moon, as luminary of the Circuit Court, whose "gladsome light of jurisprudence" must be sunshine only, not moonshine. Commissioners, masters, referees, and like judicial subordinates, may share in judicial labor and lighten it; but they cannot change places with the judge on the bench or share in the final judgments of the court.

We do not forget that this court has upheld the judgments of judges *de facto* not *de jure*, in *Re Boyle*, 9 Wis. 264; *State v. Bloom*, 17 id. 521; *Laver v. Mc Glachlin*, 28 id. 364. But in all these cases the person acting as judge held the office under color of title. So the court says in *Re Boyle*: "Every person assuming to exercise the authority of an officer does not thereby necessarily make himself an officer *de facto*. But when it appears that the person exercising the powers of an office, is in by such a color of right, and that he has such possession of the office, as makes him an officer *de facto*, then his acts as to third persons are valid, and his right to hold the office can only be inquired into in some direct proceeding for that purpose." Here, Mr. Cole was not in possession of the office of judge, and did not claim it. He only accepted a delegation of its functions *pro hac vice*, acting for the circuit judge in some sort as a *judex pedaneus* of the Roman law. And those cases are quite in accord with this.

The judgment plainly proceeded upon a mistrial, which cannot support it; and the judgment itself is plainly not a proper judgment of the court below. Whether void or voidable, it should be reversed. *Sayles v. Davis*, 20 Wis. 302; *Hays v. Lewis*, 21 id. 668.

By the Court. — The judgment of the court below is reversed, and the cause remanded for trial according to law.

MATTER OF MOSNESS.

(39 Wis. 509.)

Attorney and counsel — must be residents of the State.

A non-resident cannot be admitted to the bar although he be a counselor at law in good standing where he resides, and a statute authorizing such admission is invalid.

MOTION for the admission of Ole Mosness to the bar of this court, as an attorney and counselor thereof. It appeared from

Mr. Mosness' written application that he had been admitted to practice at the bar of the Supreme Court of the State of Illinois; and his application was supported, as the statute requires, by "an affidavit of good moral character, and that he is a resident of said State of Illinois." The court took the matter under advisement, and on the 27th of April denied the motion upon grounds stated in the following opinion.*

RYAN, C. J. It is, we believe, the general practice of courts of record in the several States, to permit gentlemen of the bar in other States to appear as counsel on the trial or argument of causes. Such has been the uniform practice of this court. And, under all ordinary circumstances, it will always be a pleasure to us to permit members of the bar of other States to argue causes here, whenever they may appear here to do so. No license to practice here is necessary or proper for that purpose; the usual and proper practice being to grant leave, *ex gratia* for the occasion.

But general license to practice here as attorney and counselor rests upon quite different considerations. The bar is no unimportant part of the court; and its members are officers of the court. *Thomas v. Steele*, 22 Wis. 207; *Cothren v. Connaughton*, 24 id. 134. See Bacon's Abr., Attorney, H.; 1 Tidd's Pr. 60; 3 Black. 25; 1 Kent, 306; *Ex parte Garland*, 4 Wall. 333. And if officers of the court, certainly, in some sense, officers of the State for which the court acts. *Re Wood*, Hopk. 6. This is not really denied in 20 Johns. 492, decided in the same year. And if it were, we have no doubt that the chancellor was

* Ch. 50, Laws of 1855 (Tay. Stats. 1344-5, §§ 39, 40), provided as follows: "Sec. 1. Any person who has been duly admitted and licensed to practice as an attorney and counselor at law in the Supreme Court of the State of Illinois, and all other States in the Union where counsel of this State are admitted as counsel of such State on the same terms hereinafter prescribed, shall be admitted and licensed to practice as an attorney and counselor at law in all the courts of this State, upon written application signed by such person, and upon presenting to such court proof that he has been so admitted to practice in the Supreme Court of Illinois and all other States in the Union where counsel of this State are admitted as counsel of such State on the same terms hereinafter prescribed, and an affidavit of good moral character, and that he is a resident of said State of Illinois. Sec. 2. It shall be the duty of any court of this State, upon application and proof aforesaid, to admit any attorney of the State of Illinois, and all other States of the Union where counsel of this State are admitted as counsel of such State on the same terms hereafter prescribed, to practice, and to take and subscribe the usual oaths required by the laws of this State in relation to attorneys at law in this State, and to issue a license as in other cases of admission of attorneys at law; and the clerk of such court to enroll the same on his roll of attorneys, as in other cases; and such attorney, so making the application as aforesaid, shall, upon receiving such license, be entitled to all the privileges of attorneys at law resident in this State."

Jennings v. Lyons.

correct; and that attorneys and counselors of a court, though not properly *public* officers, are *quasi* officers of the State whose justice is administered by the court.

The State may have extra-territorial officers, as commissioners to take acknowledgments, etc. But these are exceptions; and the general business of the State, within the State, executive, legislative and judicial, must be performed by citizens or denizens of the State; and the officers charged with it must be resident in the State. *State v. Smith*, 14 Wis. 497; *State v. Murray*, 28 id. 96.

So the courts may have extra-territorial officers, for extra-territorial functions, as commissioners to take depositions, etc. But for all functions within the jurisdiction of the courts, their officers must be residents of the State. This is essential to the nature of the functions themselves, and to the proper control of courts over their officers.

The office of attorney and counselor of the courts is one of great official trust and responsibility in the administration of justice; one liable to great abuse; and has always been exercised, in all courts proceeding according to the course of the common law, subject to strict oversight and summary power of the court. It would be an anomaly, dangerous to the safe administration of justice, that the office should be filled by persons residing beyond the jurisdiction of the court, and practically not subject to its authority. We take it, that members of the bar of this State lose their right to practice here by removing from the State. After they become non-residents, they can appear in courts of this State *ex gratia* only. Our courts cannot have a non-resident bar.

This all appears to us to be so very plain, that it is difficult to believe that ch. 50 of 1855 was intended to do more than to authorize the appearance here, as counsel in the trial and argument of causes, of gentlemen of the bar of other States. If intended to do that, it was probably unnecessary. If intended to do more, it was clearly without the power of the legislature.

For the reason only that the gentleman whose admission is moved is not a resident of the State, the motion must be denied.

JENNINGS v. LYONS.

(39 Wis. 553.)

Mast. and servants — contract for service, — when sickness no excuse for breach of.

Plaintiff agreed that he and his wife would work for defendant for a year, for a gross sum. Four months after, the wife, being about to give birth to a child, left and the

plaintiff was thereupon discharged. In an action to recover wages on the *quantum meruit*, held, that plaintiff should have foreseen and provided for his wife's sickness when he made the contract, and that, therefore, his non-performance was not excused, and he could not recover.

ACTION to recover for services rendered by plaintiff and wife to defendant.

The defense was, that the services were rendered under a contract by which plaintiff and his wife were to work for defendant one year from November 17, 1873, he upon the farm and she in the house, for \$300; that it was distinctly understood that defendant's object was to secure plaintiff's services during the spring, summer and fall months, and that he would not employ plaintiff during the winter months except for that reason; and that defendant, without just cause or legal excuse, failed to perform his contract.

The case made by the evidence will sufficiently appear from the opinion. The jury were instructed that if at the time plaintiff and his wife quit working for defendant, the wife was sick and unable to do her part of the work, plaintiff was not bound to a further performance of the contract, and was entitled to recover what the services of himself and wife were worth for the time they actually worked.

The plaintiff had a verdict and judgment; and the defendant appealed.

D. W. C. Priest, for appellant.

Thos. W. Spence, for respondent.

COLE, J. We have no doubt that the contract was for the personal services of the plaintiff and wife. The counsel for the defendant claimed that the work to be performed by the wife required no peculiar skill, and could have been performed by any ordinary hired girl competent to do housework. But the relations which a domestic servant holds to the family, and the nature of the services to be performed, are such, that the temper, habits, intelligence and character of the person are more regarded than mere ability to do work. Considering the nature of the employment, if ever a contract can be said to call for personal services, it would seem to be in case of a domestic who lives in the family of another. This view commends itself to the judgment and good sense of every one on a moment's reflection, and need not be dwelt upon further.

The question is then presented, whether the sickness of the wife under the circumstances excused performance, if the plaintiff agreed

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that he and his wife should work one year? Upon that point the court below instructed the jury, that if they should find that the contract was as claimed by the defendant, that the plaintiff and wife were to work for him a year for \$300, yet if the plaintiff quit work because his wife was sick and unable to do her part of the work, this would excuse full performance, and the plaintiff could recover what the services of himself and wife were worth for the time they actually worked. This charge was excepted to on the part of the defendant. The general rule doubtless is, that when a contract is entire, operating as a condition precedent, it is necessary for a party to show full performance on his part before he can maintain an action upon it. It would appear like mere affectation to attempt to refer to the elementary writers or adjudged cases where this principle is stated and affirmed. The authorities, however, recognize certain exceptions to the rule, as where performance has been rendered impossible by the act of God, by the act of the law, or by the act of the other party. 2 Chitty on Cont. 1073; 2 Parsons on Cont. (5th ed.) 672 *et seq.*; Story on Bailment, § 36. And where the act to be performed is one which the promisor alone is competent to do, the obligation is discharged if he is prevented by sickness or death from performing it. *Wolfe v. Howes*, 20 N. Y. 197; *Ryan v. Dayton*, 25 Conn. 188; *Fuller v. Brown*, 11 Metc. 440; *Knight v. Bean*, 22 Me. 531; *Lakeman v. Pollard*, 43 id. 463; *Green v. Gilbert*, 21 Wis. 395. In other words, sickness or death is generally regarded as an act of God in such a sense that it excuses the non-performance, and a recovery is allowed upon a *quantum meruit*. In this case it is insisted that the sickness, or anticipated sickness, of the wife furnished no excuse for the failure to perform the contract, and that the instruction of the court that it did excuse was erroneous. The argument is based on these facts:

It appears that the plaintiff and wife commenced work for the defendant on the 17th of November, 1873, and quit about the 27th of the following March. The reason why the parties left their service was, as stated by the plaintiff himself, that his wife was in the family way — expecting soon to be confined, and as a consequence was unable to work. The plaintiff says that she was actually confined within four or six weeks after she left the defendant's employment. It is argued that the plaintiff was fairly chargeable with a knowledge of the condition of his wife; must be presumed to have known that she was nearly four months advanced in pregnancy; was bound to anticipate her sickness as an inevitable event; and should have provided for it in his contract. It is said that it was the plaintiff's own fault under such circumstances to undertake and agree that he and his wife would work for a year,

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because he must have known that it would be impossible for him to perform his contract, and therefore the case does not come within the reason of the rule that sickness excuses. It is incredible that the plaintiff was ignorant of the condition of his wife when he entered into the contract. He must have known that it would be impossible for her to work at the period of her confinement and for some time thereafter. There seems no reason why he should not be held liable for a breach of his contract, absolute in its terms; "not, in fact, for not doing what cannot be done, but for undertaking and promising to do it." For when performance becomes impossible by reason of contingencies which should have been foreseen and provided against in the contract, the promisor is held answerable. 2 Parsons on Cont. 672-8. This principle applies to the facts of this case, if indeed the contract was as claimed by the defendant.

By the Court. — The judgment of the Circuit Court is reversed, and a new trial ordered.

RUSSELL V. LENNON.

(39 Wis. 570.)

Partnership — exemption — partners as such cannot claim.

Where an execution for a partnership debt is levied on partnership property either partner may sever his share and claim an exemption therein; but the partnership as such or the partners jointly can claim no exemption.

ACTION for the recovery of property claimed to be exempt from execution, with damages for its detention.

The plaintiffs were partners doing business in the city of Appleton. The defendant as sheriff levied on the partnership property of the plaintiffs then in their store under an execution to satisfy a judgment against the plaintiffs for about \$235. The plaintiffs thereupon selected property to the estimated value, as defendant alleges, of \$200, which the defendant then surrendered to them. Afterward, while the remaining property so levied upon was still in defendant's possession, the plaintiffs made a demand upon him in writing as follows: "We the undersigned, each for himself, demands as a personal right, his interest in the following schedule of property, as exempt from levy or sale on execution, and that you set the same apart and return the same to us in the same condition

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it was seized in by you;" enumerating all the articles levied upon. Defendant refused to return them, and thereupon this action was brought. The court found that the whole of said property was exempt from execution, and rendered judgment for the plaintiffs as demanded. Defendant appealed from the judgment.

Warner, Ryan & Allen, for the appellant copartnership, whatever may be the number of persons composing it, is entitled to only one exemption to the same extent as an individual. *Gilman v. Williams*, 7 Wis. 329; *In re Handling & Venney*, Cent. L. J., April 23, 1875, per DILLON, J.; *Pond v. Kimball*, 101 Mass. 105; *Guptil v. McFee*, 9 Kan. 30; *In re Blodgett*, 10 Bank. Reg. 147; *In re Price*, 6 id. 400; *Amphlett v. Hibbard*, 29 Mich. 298; *Wright v. Pratt*, 31 Wis. 99. A copartnership is in law one person or one body, and is entitled as such to but one exemption, and can claim no greater exemption than an individual. 2. The plaintiffs cannot assert in an action brought by them jointly a right claimed by each individually as a personal right.

Gerrit T. Thorn, for respondent.

RYAN, C. J. There appears to be no doubt that if the respondents had held the property claimed in this action, in equal moieties in severalty, they would have been entitled to hold each his share, as his exemption under the statutes. And upon the levy of the execution on the partnership property, they had a right to sever their interest in it; and each might thereupon have claimed his exemption in his separate part. *Newton v. Howe*, 29 Wis. 531. The difficulty in the way of the respondents in this case is not their individual rights under the statute, but in their failure properly to assert them.

The principle of all exemption laws in this State is very clearly expressed in the Constitution itself. "The privileges of the debtor to enjoy the necessary comforts of life should be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale," etc. This principle makes all constitutional exemption a personal privilege of each debtor, secured to him individually, not in mere benevolence only, but also in the interest of the State in the personal well being of each of its citizens. *Maxwell v. Reed*, 7 Wis. 582; *Bull v. Conroe*, 13 id. 233. And the statutes of exemption appear to be framed on this principle. They go to secure the necessary comforts of life to families by exemption to heads of families; and the letter and spirit of exemptions follow the constitutional principle, in securing a personal privilege to each debtor individually. There may be joint debtors, but our Con-

stitution and statutes sanction no joint exemption. The exemption "applies to the debtor in the singular number, and is personal and individual only." *Pond v. Kimball*, 101 Mass. 105.

We are aware that there are several cases to be found, chiefly in the Federal bankrupt courts, sustaining exemptions to partnerships as such. But we cannot think that these cases rest on sound principle. We have already seen that the principle of exemption and the provisions of the statute are personal. And the difficulties suggested by the Supreme Court of Massachusetts in the way of partnership exemptions seem to be insuperable. *Pond v. Kimball*, *supra*. We have no doubt, that in proper cases, each member of a partnership is entitled to his separate exemption out of the partnership property; and that the partnership property, after levy, may be served by the partners; so that each partner may have his several exemption. But it seems to us to be as indefensible to extend the personal privilege of exemption to a partnership, as such, as to extend it to a corporation aggregate. In the language of the Massachusetts court: "The exemption, in our opinion, is several and not joint; . . . is personal and individual only."

It is true that the judgment in this case is supported by *Gilman v. Williams*, 7 Wis. 329. That case indeed went upon the exemption of one to a partnership of two. But as the one exemption was in the personal right of one of the partners, the rule would support two exemptions as well as one. But we feel constrained to hold that case to be, so far, in violation of correct principle. It was no doubt a great temptation in that case, as it has been in this, to support an exemption which might have been, but was not, properly asserted; to make the judgment, "to do a great right, do a little wrong." But the view of the learned judge who delivered the judgment in that case is clearly erroneous. He reasons that either of the two partners might have held the whole property exempt; that each might therefore hold a moiety of it exempt; and that so the joint suit by both partners for the whole could be sustained. He appears to have overlooked the elementary principle that several rights of several persons cannot be asserted in a joint action at law by all; that partners can maintain an action as such for partnership rights only. The truth appears to be that this question was very much disregarded in view of others in that case, then deemed of much greater moment.

The rule in *Gilman v. Williams* does not appear to have been since considered in this court, though there are cases which seem to be somewhat in conflict with it. *West v. Ward*, 26 Wis. 579; *Wright v. Pratt*, 31 id. 99. And we therefore feel at liberty, though with great reluctance, to overrule a case wrongly decided so long ago, and not since affirmed.

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We are not unmindful of the beneficent character of statutes of exemption, or of our duty to construe them liberally in favor of their object. *Kuntz v. Kinney*, 38 Wis. 510; *Jarvais v. Moe*, 38 id. 440. But we must administer them according to their letter and spirit, as well as the settled principles and established forms of legal proceedings. We reverse this judgment with great reluctance, especially because the respondents seem to have been misled by *Gilman v. Williams*.

COLE, J. I am disposed to adhere to the rule of *Gilman v. Williams*, which was long since decided, and which gives the partnership the benefit of one exemption. That decision is supported by the case of *Stewart v. Brown*, 37 N. Y. 350. If the question were a new one in this State, I might conclude to hold with my brethren. As it is, I am constrained to dissent.

By the Court. — The judgment of the court below is reversed, and the cause remanded with directions to the court below to dismiss the complaint.

 WATSON V. WILCOX.

(39 Wis. 643.)

Lis pendens—sufficiency of—surplusage.

A notice of *lis pendens* was filed containing a correct statement of all the facts required by the statute to be stated, and, in addition thereto, an incorrect description of the property "intended to be affected" thereby. Held, that the description should be rejected as surplusage and that the notice was sufficient.

ACTION to have a mortgage declared valid and for a decree of foreclosure thereof. The opinion states the facts on the only question of interest passed upon.

William Ruger, for appellant.

I. O. Sloan, for respondent.

RYAN, C. J. This appeal involves two distinct questions:

I. The sufficiency of the *lis pendens* in the action brought by the respondent against Bates and others.

That was a suit in equity, seeking to have certain conveyances held

for mortgages only, and certain conveyances held to be void. Notice of the pendency of the action was filed, stating the nature of the suit, enumerating the several conveyances involved, and describing the land conveyed by each conveyance. We cannot doubt, and we do not understand it to be seriously questioned, that if the notice had there stopped, it would have been a sufficient compliance with the statute. Ch. 134, § 7, R. S. For it gave, in very intelligible form, the names of the parties, the object of the action, and a description of the property affected by it. But the notice proceeds, by way of supererogation, to add a conclusion undertaking to describe, what had already appeared, the property to be affected by the action, and giving a wrong description. By what is obviously a clerical error, this description twice substitutes the word *north* for *south*, and so describes other land not included in the conveyances in question. And the only question on the sufficiency of the *lis pendens* is, whether this needless and false conclusion vitiates the whole notice.

We cannot think that it does. The statute charges every subsequent purchaser with constructive notice of the whole paper filed, which gives notice of the property affected by its true description. The constructive notice of the statute is equivalent to actual notice by reading the *lis pendens* filed. Any person of reasonable intelligence, reading it, would perceive the error. And the appellant, as others interested in the title appears to be chargeable with knowledge that the true description of the property is in the statement of the conveyances, because they are in his chain of title. *Pringle v. Dunn*, 37 Wis. 449, and cases there cited. Were that otherwise, the notice is sufficient as to both descriptions, the true and the false. The false description is mere surplusage; and *utile per inutile non vitiatur*. See *Thompson v. Jones*, 4 Wis. 106; *Jarvis v. McBride*, 18 id. 316; *Dupont v. Davis*, 30 id. 170. All that the statute requires is in the notice, independently of this superfluity, which serves only to add notice of a falsehood to notice of the truth.

This case is quite distinguishable from *Spraggon v. McGreer*, 14 Wis. 439, and *Miller v. Sherry*, 2 Wall. 237, cited for the appellant. In the first of these cases, the notice of *lis pendens* contained no correct description of the premises in controversy; and in the second, the creditor's bill, which was relied on for notice, described no specific reality whatever. It is also distinguishable from *Thomson v. Wilcox*, 7 Lans. 376, in which there was a single misdescription by metes and bounds coupled with the correct street number. There the one description was inconsistent with itself, the principal description being bad and the incident good. This is essentially different from two descriptions of different parcels, both certain in themselves. In the case in Lansing there was a

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failure of correct description of any land ; in this, there is a correct and independent description of the land in controversy, and also a correct and independent description of other land not in controversy, inserted by mistake ; a mere surplusage.

Of course, the merits of the case in which the *lis pendens* was filed, are not before us here. And, for the reasons stated, we hold the *lis pendens* sufficient to charge the appellant with notice.

[The court then decided that one, who, having no interest to protect, voluntarily loans money to a mortgagor for the purpose of satisfying and canceling the mortgage, taking a new mortgage for his own security, cannot have the former mortgage revived and himself subrogated to the rights of the mortgagee therein.]

Judgment affirmed.

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CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

RAISIN V. CLARK.

(41 Md. 158.)

Real estate broker — not entitled to commissions from both seller and buyer — custom.

A real estate broker was employed by A to sell a farm. He exchanged it for lands of B, receiving a commission from A for his services. *Held*, that he could not recover a commission from B also, either on proof of an express promise by B to pay, or of a usage among brokers to charge commissions to both parties.

ACTION to recover commissions. The opinion states the case.

R. R. Boorman and *William A. Fisher*, for appellant.

Fielder C. Slighuff, for appellee.

MILLER, J. The appellant is a real estate broker, doing business in Baltimore city, and as such was employed by Mr. Cooper, to sell for him, his farm in Baltimore county. As Cooper's agent, he advertised the farm for sale, and the appellee seeing the advertisement called upon him and proposed to exchange a house she owned in the city for the farm, and the exchange was effected. Cooper paid the appellant the usual commission of two and a half per cent on \$6,000, the value placed upon the properties so exchanged, and in this action he seeks to recover the like commission from the appeller. He places his claim on two grounds :

1st. Upon an express agreement or contract between the appellee and himself that she would pay him such commission in case the exchange was effected.

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2d. Upon an alleged custom or usage among brokers in the city of Baltimore, that in exchanges of real estate they are entitled to a commission of two and a half per cent from each party on the amount or value of the property exchanged.

The testimony is conflicting as to the making of the alleged agreement, but the question presented for the determination of this court by the present appeal is, whether such an agreement, if made, can be enforced by the agent, by an action founded thereon? That the appellant was Cooper's agent to sell his farm, and that the alleged agreement, if ever made, was entered into, while this employment continued, are conceded facts in the case. In this state of facts could he lawfully become the agent of the party by whom the farm was purchased by way of exchange of property? In our opinion it is very clear he could not. It is a general rule that a party cannot in any agency of this kind act as agent or broker for both vendor and vendee in respect to the same transaction, because in such case there is a necessary conflict between his interest and his duty. The vendor in the employment of an agent to sell his property bargains for the disinterested skill, diligence and zeal of the agent for his own exclusive benefit.

It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interest of the principal as far as he lawfully may. The seller of an estate is presumed to be desirous of selling it at as high a price as can fairly be obtained for it, and the purchaser is equally presumed to desire to purchase it for as low a price as he may. The interest of the two are in conflict. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.* But if the same party be allowed to act as agent for both, it becomes his interest to have this maxim reversed, or at least to sacrifice the interests of one or both of his principals in order to advance his own by receiving double commissions. Hence the law will not permit an agent of the vendor whilst that employment continues, to assume the essentially inconsistent and repugnant relation of agent for the purchaser. Story on Agency, §§ 210, 211; *Schwartz v. Yearly*, 31 Md. 278. In a very recent English case (*Morrison v. Thompson*, 9 Law Rep. 480), the plaintiff employed a broker to purchase a particular ship on the basis of an offer of £9,000, or as cheaply as he could, but eventually the ship was purchased for £9,250. Prior to the sale an arrangement had been made between the vendor and a broker, Scott, that if the latter could sell the ship for more than £8,500, he might retain for himself the excess, and it was arranged between Scott and the defendant, without the knowledge or sanction of

the plaintiff, that defendant should receive from Scott a portion of this excess, and he accordingly received £225, part of the excess over £8,500. On discovering this the plaintiff brought an action for money had and received against the defendant for the £225, and the Court of Queen's Bench sustained the action and allowed the recovery. In the course of his opinion, COCKBURN, C. J., declared the law on the subject to be well and compendiously stated, in Story on Agency, § 211 (to which we have referred), in these terms: "Indeed it may be laid down as a general principle that in all cases where a person is either actually or constructively an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers." In the case before us the appellant testified that he informed Cooper that the appellee was to pay him commissions if the exchange was made. This would probably prevent a recovery from him by Cooper of such commissions in case they had actually been paid by the appellee, but it does not follow from this that he can enforce the contract against the appellee and compel her to pay them. The rule to which we have adverted forbids the courts to entertain an action founded upon such a contract. Nor does it prevent the application of the rule, that this was an exchange of properties and not a sale of the farm for money. The reasons upon which the sale is founded apply with equal force whether money or property at an ascertained value be received by the vendor for the property he parts with. It is perhaps possible for the same agent to serve both parties to such a transaction honestly and faithfully, but it is very difficult to do so, and the temptation to do otherwise is so strong that the law has wisely interposed a positive prohibition to every such attempt. As said by Judge STORY, in one of the sections of his book on Agency, already referred to: "It is to interpose a preventive check against such temptations and seductions that a positive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity."

After what has been said, it is hardly necessary to add that the usage or custom relied on cannot avail the appellant. A usage in contravention of a well-settled and salutary rule of law cannot be sustained by courts of justice. The appellant is therefore not entitled to recover on either ground upon which he bases his claim. The rulings of the court rejecting his two prayers accord with the views above expressed, and it follows that error, if there be any in granting the appellee's second prayer, has resulted in no injury to the appellant, and the judgment must be affirmed.

Judgment affirmed.

 Berry v. The Baltimore and Drum Point Railroad Company.

BERRY appellant, v. THE BALTIMORE AND DRUM POINT RAILROAD COMPANY.

(41 Md. 446.)

Statutes — presumption as to formalities of enactment — parol evidence to impeach — statute good in part, and void in part.

Where an act has been duly authenticated, and published as law by authority, the presumption is, that all the constitutional solemnities and prerequisites necessary to its valid enactment have been complied with ; and this presumption exists until the contrary is clearly made to appear. But when it can be made clearly to appear that the particular bill, or section of a bill, although it may have all the forms of authentication, has never in fact received the legislative assent, the court is bound to look not only behind the printed statute book, but beyond the forms of authentication of the bill as recorded in the office of the Court of Appeals, and if the evidence be clear and entirely satisfactory to the mind of the court, to decide accordingly. *

A statute having the proper forms of authentication cannot be impeached or questioned upon mere parol evidence.

The journals of the two houses of the legislature, in connection with other competent evidence upon the subject, may be examined as means of information to aid in arriving at a correct conclusion as to what was the action of the legislature on any particular bill before it.

Statutes may be good in part and void in part, and if the part that is valid be entirely distinct and severable from that which is void, the former will be upheld and enforced as if passed disconnected from the latter.

BILL for an injunction. The opinion states the case.

Frank H. Stockett, for appellant.

Daniel Clarke and *Alex. B. Hugner*, for appellee.

ALVEY, J. This is an appeal from a *pro forma* order of the court below, refusing an injunction to the appellant, to restrain the execution of a judgment recovered against him by the appellee, for balance of subscription to the stock of that corporation ; and the ground of the application is, that, under the act of 1874, ch. 389, § 3, amendatory of the company's charter, which was granted by the act of 1858, ch. 364, the duration of the charter is limited to the 1st of January, 1875, the company not having finished or completed its road as provided it should have done.

By the 19th section of the original charter of 1868, it was provided that if the company did not commence the road within six years from the passage of the act, and should not finish the same in four years from

* See *Moody v. State*, 17 Am. Rep. 28; *State v. Platt*, 16 Md. 647; and *Osborne v. Staley*, 13 Md. 640 and note.

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the time of the commencement thereof, then the charter should be null and void. By agreement filed in the cause it is admitted that the road was commenced in 1873; and by the preamble to the third section of the amendatory act of 1874, ch. 389, it is stated that the company had been duly organized, and the work of construction of the road commenced, but that it was feared the time allowed by its charter for the completion of the road was insufficient, and that an extension of time therefor was desired; and following this preamble is the third section of the act of 1874, which, as published in the printed volume of the laws, provides that if the road shall not be finished in five years from the 1st of January, 1870, then the charter, and all its amendments, to be null and void. Under the charter, before it was amended by the act of 1874, the company had until the year 1877 to complete the road, but under the third section of the amendatory act, as published, it has only until the 1st of January, 1875; so that, instead of obtaining an extension of time, as was designed, the company has in fact been restricted in the time allowed by the original charter.

The appellee, in its answer to the appellant's bill, avers and insists that the third section of the amendatory act of 1874, as it appears in the printed volume of the statutes of the last session, never in fact passed either house of the legislature. That the third section of the act, as it in truth and reality did pass the two houses of the General Assembly, provided for an extension of time for the completion of the road for five years from the first of January, eighteen hundred and seventy-five; and that the change was made in the section after the final passage of the act, either by design or mistake, by some clerk or copyist, in omitting the word "five" after the word "seventy." And in verification of the fact that such was the time for which the extension was given by the section of the act as actually passed, the engrossed bill, as it was finally acted on by the two houses of the legislature, with the indorsements thereon by the proper officers, as to the action of the respective houses, together with the journals of both houses, have been produced from the custody of their proper custodian; and from the evidence thus furnished, it is made clear beyond all question or dispute, that the particular section of the act involved, as it passed the two houses of the legislature, is essentially different from the corresponding section in the act that received the imprint of the Great Seal, the signature of the governor, and was lodged in the office of this court for record, and afterward published. As the bill passed the legislature, the extension of time for the completion of the road, as provided in the third section, was for five years from the 1st of January, 1875; as it now reads in the printed

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statute book, the extension is for five years from the 1st of January, 1870. How this change or alteration occurred can only be matter of conjecture. But we may readily suppose that if the engrossed bill, as it was finally acted on by the two houses of the legislature, had been sealed and submitted to the governor for his signature, instead of being intrusted to some careless or inexperienced clerk to be copied for such authentication and approval, the alteration or omission would hardly have occurred.

This change or alteration in the act is of serious import to the railroad company; and the question now is, how is the matter to be dealt with by the courts? It is contended by the appellant that the law must be taken to be as we find it evidenced by the bill filed in the office of this court, under the Great Seal, and the signature of the governor; while, on the other hand, it is insisted by the appellee that it is competent to this court to examine the journals of the two houses of the General Assembly, and the original engrossed bill, with the indorsements thereon, in order to ascertain and determine what were the provisions of the act that really passed the two houses of the General Assembly.

In opposition to the right to examine the journals, and the engrossed bill with its indorsements, to ascertain what the particular act was that received the assent of the legislature, the appellant relies upon the cases of *Fouke v. Fleming & Douglass*, 13 Md. 392, and *The Mayor, etc., of Annapolis v. Harwood*, 32 id. 471; S. C., 3 Am. Rep. 161. But those cases were not in all respects similar to the one now under consideration. In those cases it was not made distinctly to appear that the particular provision of the statutes as published did not receive the legislative assent; the evidence not being such as the court was willing to accept, to overcome the strong presumption arising from the due authentication of the statutes there involved. It was assumed, from the fact that the bills, as published, corresponded in all respects with the bills as engrossed, that they did receive the assent of the legislature. But in the case now before us, it is plainly shown, by the most unquestionable evidence, that the third section of the bill as engrossed, before the third reading and the passage thereof, pursuant to the requirement of the Constitution, art. 3, § 27, and as it actually passed, is essentially different from the corresponding section in the bill that was attested, sealed, signed by the governor, and filed for record. There is therefore no ground for presumption in favor of the identity of the bill as recorded in the office of this court, with that which passed the legislature, unless we make the facts of the attestation, the imprint of the Great Seal, the signature of

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the governor, and the filing for record, conclusive upon the question as to what is law, and exclude all other evidence upon the subject, no matter how plain and direct it may be. But to do this would be virtually denying to the people of the State the benefit of the safeguards provided by the Constitution, and to allow and enforce that as law which has not been assented to by their representatives. The Constitution has prescribed certain modes and prerequisites for the enactment of laws, and as these, by the terms of the Constitution, are imperative conditions, no bill, not so enacted in law, should be allowed to affect the rights of the citizen. Suppose, for instance, it could be plainly shown by competent evidence for the purpose, that a particular bill, alleged to have been passed by the legislature, had never been put to final vote, or that it had been declared passed without previous readings, and in total disregard of the expressed mandatory requirements of the Constitution, as to the manner in which a bill can be enacted into a law, could it be successfully maintained that such alleged act should be enforced as law, notwithstanding the omission or non-observance of the essential conditions and prerequisites upon which a law can be enacted under the Constitution? We suppose not. And if not in such case, *a fortiori* should it not be enforced as law when it is plainly made to appear that it has never been before the legislature at all.

Unquestionably, where an act has been duly authenticated and published as law by authority, the presumption is, that all the constitutional solemnities and prerequisites necessary to its valid enactment have been complied with; and this presumption exists until the contrary is clearly made to appear. But when it can be made clearly to appear, as in this case it has been, that the particular bill or section of a bill, although it may have all the forms of authentication, has never in fact received the legislative assent, we think the court is bound to look not only behind the printed statute book, but beyond the forms of authentication of the bill as recorded in the office of this court, and if the evidence be clear and entirely satisfactory to the mind of the court, to decide accordingly.

This question has repeatedly arisen in several of the State courts of the highest authority, and in all cases, with but few exceptions, it has been held, that neither the printed statute book, nor the ordinary authentication of the statute after its passage, would preclude the inquiry into the fact, whether the statute as published had in truth passed the legislature; and as evidence upon the question, the legislative journals, and the bills as acted upon by the legislative assemblies have been consulted. *Purdy v. The People*, 2 Hill (N. Y.), 33; S. C., 4 Hill, 384; *De Bow v. The People*, 1 Denio, 11; *Southwark Bank v. Commonwealth*, 2

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Penn. St. 446; *Spangler v. Jacoby*, 14 Ill. 297; *Turley v. Logan County*, 17 id. 151; *People v. Stone*, 35 id. 121, 141; *People v. Mahany*, 13 Mich. 481; 35 N. H. 579; 52 id. 622; Cooley on Const. Lim. 135; Smith on Const. & Stat. Law, §§ 949, 50; Sedgw. on Const. & Stat. Law, 69; Cushing on the Law of Legislative Assemblies, §§ 2211-12-19-22 and 2405.

But while the authorities just cited maintain that it is the right and duty of the court to go behind the authentication of the statute, and to receive evidence, such as that furnished by the engrossed bills, with the indorsements thereon, and the journal of proceedings of the two houses of the legislature, upon the question of the constitutional enactment of what purports to be a statute, they all seem to concur in maintaining that no statute, having the proper forms of authentication, can be impeached or questioned upon mere parol evidence. Nor do we decide in this case, that the journals of the two houses, though required by the Constitution to be kept as records of their proceedings, would be evidence *per se* upon which the validity of a statute, having the required authentication, would be successfully questioned as to the manner of its enactment. But we think the journals, in connection with other competent evidence upon the subject, may be examined as means of information to aid in arriving at a correct conclusion as to what was the action of the legislature on any particular bill before it. And while the evidence must be of the most satisfactory character, in order to overcome the presumption arising from due authentication of the statute, we think we may safely conclude with the Supreme Court of the United States, in the case of *Gardner v. The Collector*, 6 Wall. 499, that, on principle as well as authority, whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is reliable and capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule. And applying this rule to the present case, as we can have no doubt whatever that the third section of the act in question, as that act was sealed and approved by the governor, is materially different from the third section of the act as it passed the two houses of the legislature, we must, therefore, declare that particular section of the act to be null and void.

And having thus declared the third section of the act a nullity, the next question is, how does that affect the remainder of the statute?

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Upon examination it is found that the third section is entirely separate and disconnected from the other sections of the act, and that the operation and effect of those sections in no manner depend upon the co-existence of the third section. As applicable to such case, Judge COOLEY, in his work on Constitutional Limitations, p. 177, says: "It will sometimes be found that an act of the legislature is opposed in some of its provisions to the Constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the Constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association, must depend upon a consideration of the object of the law, and in what manner, and to what extent the unconstitutional portion affects the remainder." Here, as the entire published statute, except the third section, was regularly passed by the legislature, and approved by the governor, there can be no reason for declaring the other portions of it void, because the third section is found to be a nullity. Statutes may be void in part and good in part; and if the part that is valid is entirely distinct and severable from that which is void, the courts will uphold and enforce the former as if passed disconnected from the latter. *State v. Commissioners of Balto. Co.*, 29 Md. 521; *Mayor, etc., of Hagerstown v. Dechert*, 32 id. 369; S. C., 3 Am. Rep. 161. That principle applies to this case.

It follows from what we have said, that the 19th section of the appellee's charter is left unaffected by the act of 1874, and that that section still prescribes the limitation for the commencement and completion of the road. And, as in this view of the case the appellant's bill presents no ground for an injunction, the order appealed from will be affirmed, and the bill dismissed.

Order affirmed, and bill dismissed.

 THORNER V. BATORY.

(41 Md. 593.)

Judgment—action on judgment of another State.

In an action of replevin in Tennessee the defendant had judgment as authorized by the law of that State for a return of the goods or, failing that, that he recover of the plaintiff and his surety in the replevin bond the value of the goods. Held, that an action of debt on this judgment, against the plaintiff and the surety, was not maintainable in Maryland.

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ACTION of debt against Batory and another upon a judgment recovered in Tennessee. The opinion states the case.

Join S. Wirt and Richard M. Venable, for plaintiff.

Wm. F. Frick, for defendant.

MILLER, J. In this case Thorner and Heidelbach brought an action of debt against Batory and Jackson, upon a judgment recovered by the plaintiffs against the defendants in the State of Tennessee. Batory was summoned and Jackson returned *non est*. The first count of the declaration is upon an absolute judgment for a certain sum of money. *Nul tiel recora* was pleaded to this count, and on production of the record of the judgment sued on this plea was very properly sustained. A similar plea to the second count was overruled, and under instruction from the court the jury rendered a verdict in favor of the plaintiffs for \$2,039.96. Subsequently on motion of the defendant, the court arrested judgment on this verdict, and the plaintiffs have appealed.

The record of the Tennessee judgment shows that Batory obtained a writ of replevin for certain goods in the possession of Thorner & Heidelbach which he claimed as his, and Jackson became his surety on the replevin bond. Under the writ, the goods were taken by the sheriff and delivered to Batory, who then filed a declaration against the defendant "for the goods" (specifying them), "which he says the defendants wrongfully detained from him," and "for \$2,000 damages for the detention thereof." The defendants pleaded not guilty. The plaintiff failing to prosecute the suit, a judgment by default (as it is termed) was rendered against him by which the court adjudged, "that the defendants recover of the plaintiff their damages occasioned by the unlawful seizure and detention of the property in the pleadings mentioned," and under a writ of inquiry to assess these damages, the jury found and assessed "the defendants' damages for the detention of the goods in the declaration mentioned, from them by the plaintiff, to \$161.10, and they find the value of said goods to be \$1,283." Upon this verdict the court gave judgment "that the plaintiff return said goods to the defendants, and if he fail to do so, that the defendants recover of the plaintiff and H. C. Jackson, his security in the replevin bond given in this cause, the value of the goods as found by the jury," and further, "that the defendants recover of the plaintiff and his surety, H. C. Jackson, the sum of \$161.10 damages for the detention thereof, and also the costs of this suit, for which execution may issue." We have thus stated the proceedings and judgment at length

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in order to show that this judgment is valid only by virtue of some statute law of Tennessee. Neither in this State nor at common law could such a judgment be rendered in an action of replevin.

The second count of the declaration sets out this *alternative* judgment and avers that it remains in full force, unreversed and unsatisfied, and that Batory has not returned to the plaintiffs the said goods or any part of them, "whereby an action hath accrued to the plaintiffs to have and demand of and from the defendants the sum of \$1,469.55," that being the aggregate of the value of the goods, the damages assessed for their detention and the costs of suit. We entirely concur with the learned judge of the Superior Court in arresting judgment upon this verdict, and with the reasons he has assigned therefor. The judgment sued on is not such an one as the courts of this State can carry into effect by a like judgment to be rendered here. Any other judgment would be transcending the powers of our courts, which must be limited to the same measure of relief which the plaintiffs were entitled to in the State of Tennessee. The action brought on this judgment is an action of *debt* in which the only judgment that can be rendered is for a certain sum of money. It is clear that such an unconditional judgment would take from the defendant the right which he had under the Tennessee judgment to satisfy it by returning the property, and to that extent would work an unauthorized change of the rights of the parties. The views of Judge REDFIELD in the case of *Dimick v. Brooks*, 21 Vt. 569 (cited in the opinion of the court below), seem fully to sustain the position here taken, and we have no hesitation in adopting them.

Order affirmed.

GROVE, appellant, v. TODD.

(41 Md. 633.)

Dower — release of — must be by deed duly acknowledged — defective acknowledgment — remedial legislation.

A wife can only be divested of her dower by a deed properly and legally acknowledged and a deed not so acknowledged is wholly inoperative as to her, and is to be treated as if she had not been a party to it.

A wife joined in her husband's deed for the purpose of releasing her dower; but the deed was so defectively acknowledged as to be, under the then existing law, inoperative and void as to her. Afterward, and after the husband had died, the legislature

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enacted that all deeds having such defects in the acknowledgment should be as valid to all intents and purposes as if regularly acknowledged. *Held*, that the deed was not revived and validated as against the wife; but *semble*, that as against the husband's heirs the deed was made good by the statute.

BILL to have a deed declared null and void and for the assignment of dower. The opinion states the case.

John J. Donaldson and Thomas Donaldson, for appellants.

Charles W. Ross and William A. Fisher, for appellee.

ALVEY, J. There are but two questions presented by the record in this case. First, whether the defective or invalid acknowledgment of the deed of the 29th of November, 1866, by Benjamin Todd, and Ruth, his wife, has been so far aided and cured by the act of the legislature of 1867, ch. 160, as to render the deed valid and effectual as against the wife to bar her right and claim to dower in the land attempted to be conveyed; and if such has been the effect of the act of 1867, secondly, whether the wife Ruth was induced to sign or execute the deed under such circumstances of fraud and circumvention as will entitle her to relief from its operation.

The deed purports to convey a farm of about 1318 acres of land in Frederick county, to Benjamin H. Todd and Jesse E. Todd, children of Jesse Todd, deceased, the illegitimate son of Benjamin Todd, the grantor. The consideration expressed in the deed was the love and affection which the grantor, Benjamin Todd, bore to the grantees, whom he called his grand-children. The wife Ruth bore no blood relation whatever to these children. The deed, while it professes to have been executed and acknowledged in Frederick county, before a justice of the peace of that county, was in fact executed and acknowledged in Carroll county, where the grantor and his wife at the time resided, before a justice of the peace of Frederick county. Benjamin Todd, the grantor, died intestate in December, 1866, and his widow, one of the appellants, intermarried with Samuel Grove, the other appellant, some time in the summer of 1867. The bill is filed by the appellants to have the deed declared a nullity, and for the assignment of dower in the land attempted to be conveyed. A large mass of proof has been introduced, reflecting upon the question of fraud, but from the view we have of the case it will become unnecessary to determine whether the allegations of fraud be fully sustained or not.

1. As to the question of the defective or invalid acknowledgment of the deed.

That the deed is wholly inoperative and void, as against the wife, without the aid of the act of the legislature of 1867, ch. 160, has not been denied, or in any manner controverted; but it is insisted by the appellees that the act just referred to has effectually cured and made valid the otherwise void acknowledgment, and that the deed, by means of the curative act, operates to extinguish all right of dower in the land mentioned.

The language of the act relied on is certainly broad and comprehensive. It declares: "That all deeds executed and acknowledged by the grantors, since the 1st day of November, 1864, in the county in this State in which the grantors then resided, before any other justice of the peace of any other county in this State, duly commissioned and qualified, shall be as valid to all intents and purposes as if acknowledged in the county where the lands in whole or in part are situate, before a justice of said county, or as if acknowledged before a justice of the peace of the county in which the grantors resided." Before the passage of this act, Benjamin Todd had died, and by that event the widow's right to dower in the lands mentioned in the deed had become vested and absolute; and she is now entitled to have that dower assigned, unless her right is barred by the deed of the 29th of November, 1866.

By the common law, a *feme covert* could not release or convey her inchoate right of dower in her husband's lands by deed, but only by fine or common recovery. In this State, however, she is enabled by statute to release her dower either by joining in the deed of her husband, or by separate deed, accompanied in either case by proper acknowledgment, as the law directs. Code, art. 55, § 11. This acknowledgment is required to be made, if within the State, either before some judge or justice for the county or city within which the real estate, or some part of it, lies, or some judge or justice for the county or city in which the grantor may be at the time of acknowledgment; and if before a justice of the peace of a county or city other than that in which the land lies, the official character of such justice is required to be certified by the clerk of the court; and without the acknowledgment thus required, it is declared that no estate of inheritance or freehold, or any declaration or limitation of use, or any estate for above seven years, shall pass or take effect. Code, art. 24, §§ 1, 2, 3. The acknowledgment is therefore essential to the validity of the deed, as a legal conveyance, and not only so, but it must be before the proper officer; for if made before a justice of the peace out of the county or city for which he was appointed, the acknowledgment is as inoperative and void, as if the person taking it was wholly without official character. *Dyer v. Etingre & Besore*, 2 Gill,

151. Whatever may be the effect and operation of the deed, without proper acknowledgment, as against the husband, it is certain that the wife could only be divested of her estate by proper and legal acknowledgment, and a deed not so acknowledged, is *wholly inoperative* as to her, and is to be treated as if she had *not been a party to it*. *Johns v. Reardon*, 11 Md. 465; *Steffey v. Steffey*, 19 id. 5. The deed before us, being without acknowledgment, was utterly null and void as against the wife, *both at law and in equity*, and she was under no obligation, and could not be compelled, to rectify it, so as to give it operation and effect. *Gebb v. Rose*, 40 Md. 387; *Drury v. Foster*, 2 Wall. 24.

Such then being the state and condition of the widow's title to dower in the lands mentioned in the deed, at the time of the passage of the act of 1867, ch. 160, was it within the constitutional power of the legislature, by retroactive legislation, to give force and validity to the deed, as if properly acknowledged, and thus divest a vested estate?

That the legislature may, in proper cases, by retroactive legislation, cure or confirm conveyances, or other proceedings, defectively acknowledged or executed, we entertain no doubt. As authority for the exercise of such power, we have long usage and many precedents. Such legislation is sustainable, because it is supposed not to operate upon the deed or contract, by changing it, but upon the mode of proof only. *Journeay v. Gibson*, 56 Penn. St. 57; *Shonk v. Brown*, 61 id. 321. And in this case we are of opinion that the act of 1867, ch. 160, has operated to cure and make effectual the deed before us, as against the husband and his heirs. The deed was a good grant at the common law, as against the husband, and he executed it upon a strong moral consideration, apart from the fact that it was designed to carry out a long settled and determined purpose of his so to dispose of the estate. But not so as to the wife. As to her, she being without capacity to make a deed or contract, except in a particular mode, not complied with in this case, the deed by which she is now sought to be barred was no more than a blank piece of paper; and as when vested rights are spoken of by the courts as being guarded against legislative interference, they mean those rights to which a party may adhere, and upon which he may insist without inflicting a wrong upon others (9 Gill, 309), we think the right of the appellant in this case is of that character. She has a right to insist, according to the Declaration of Rights, art. 23, that she shall not be disseized of her freehold, liberties or privileges, or deprived of her property, otherwise than by the judgment of her peers, or by the law of the land; or, as these latter terms are defined, by due course of legal proceedings, according to those rules and forms which

have been established for the protection of private rights. 2 Kent's Com. 13; *The Regents v. Williams*, 9 Gill & J. 412; *Wright v. Wright*, 2 Md. 452; *Westervelt v. Gregg*, 12 N. Y. 209; *Reese v. City of Watertown*, 19 Wall. 122. The deed being utterly void and without effect as to her estate, if she is now divested of her right of dower, it is by force of the statute and not of the deed; the statute operating through the form of the otherwise void deed to transfer the estate. To concede to the legislature the power, by retroactive legislation, adopted without the consent of the party to be affected, to accomplish such a result, is at once to concede to it the power to divest the rights of property and transfer them, without the forms of law, upon any notion of right or justice that the legislature may think proper to adopt: a concession that can never be made in a government where the rights of property do not depend upon the mere will of the legislature, and which professes to maintain a regular system of laws for the protection of the rights of property of its citizens.

Great reliance has been placed on several cases cited in argument, supposed to be in support of the constitutional power of the legislature to cure and make valid deeds, such as the one now under consideration. But upon examination they will be found to be cases essentially different from the one now before us. The first of the cases cited is that of *Hollingsworth v. McDonall*, 2 H. & J. 230. There, under a deed of settlement of land which had belonged to the wife before marriage, the estate was limited to the separate use of the wife for life, with a vested estate in fee-tail to her son, the reversion in fee to the mother, the son being by a former husband. After the marriage, the husband and wife, together with the trustee, in whom the legal estate was vested, made a deed of bargain and sale to the son, of the fee simple estate in the land. In the acknowledgment of this deed, the word "fear" was omitted, though the deed and acknowledgment were in all other respects regular and formal. The son was let into possession under the deed, and died in possession of the land, having by his will devised it to his mother. The son having died insolvent, his creditors filed a bill against his mother and her husband, treating the mother as devisee, and prayed a sale of the land for the payment of the son's debts. To this bill the husband and wife answered, *admitting* that the son died seized in fee of the land, and that he had devised the same to his mother. Whereupon a decree for sale was passed, a sale made and reported, and which was confirmed *by consent* of the husband and wife. Afterward they filed a bill in the nature of a bill of review, wherein they alleged that they had, since the ratification of the sale, discovered that the deceased son had never been

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seized of the fee in the land, but the same belonged to the mother, and that the deed to the son was not so acknowledged as to pass the estate of a *fême covert*. This bill was dismissed by the Chancellor, and the case was taken to the Court of Appeals, and after it was there argued, but before decision rendered, the curative act of 1807, ch. 52, was passed, which the Court of Appeals said operated to render the deed valid and effectual. Such was the case of *Hollingsworth v. McDonald*; and certainly it falls far short of an authority for the support of legislative power to impart life and operative vitality to a deed, such as that before us, as to the estate of the wife.

The next case relied on is that of *Dulany & Dangerfield v. Tilghman*, 6 Gill & J. 461. That was a case where a deed of settlement was defectively executed, and the legislature, upon the application of the grantor, having made another or a modified settlement, it was held, that the first deed was not affected by the subsequent general acts of the legislature, intended to cure deeds defectively executed. Whether the act of the legislature, involved in that case, was nugatory and void, as an unauthorized usurpation of power denied to the legislature, upon principles of common right or constitutional restriction, was a question which the court expressly said they were relieved from considering. "The title of the property," said the court, "by reason of the defective acknowledgment, remaining in the petitioners, it was unquestionably competent for the legislature, at their request, to settle it in the mode prescribed by the act of the Assembly." There was nothing decided in that case that in any manner conflicts with what we decide in this.

The case of *Baughner v. Nelson*, 9 Gill, 299, is also relied on by the appellees; but we can perceive nothing in that case that supports the position assumed by the appellees' counsel. That was the case in which it was decided that a defendant had no such vested or constitutional right in a defense of usury to an otherwise honest and proper debt, whereby he was enabled to insist upon the forfeiture of the entire debt, as should be guarded and saved from the operation of a repealing act of the legislature. The court said there was no vested right, in the proper sense of the term, divested by the act of the legislature then under review; that the act was no more than the proper exercise of the legislative authority over the subject of remedies; a power which can be exercised as well in relation to past as to future contracts. That when vested rights are spoken of by the courts as being guarded against legislative interference, they mean those rights to which a party may adhere, and upon which he may insist, without violating principles of sound morality.

The case of *Harrison v. Harrison*, 22 Md. 468, also relied on, decides nothing that properly applies to this case. The marriage that was celebrated in the District of Columbia, between the uncle and his niece, was held *not* to be *ipso facto* void, but only voidable upon judgment or decree pronounced in the life-time of the parties, in a direct proceeding taken for the purpose; and the marriage act of 1777, ch. 12, imposing the disability, being penal in its character, it was further held to be competent to the legislature, by the subsequent act of 1860, ch. 271, to relieve from the disability, and to make such marriage valid. This can in no manner aid the appellees in this case.

There were cases from other States referred to, those most relied on being cases decided by the Supreme Courts of Pennsylvania and Ohio. In those two States, legislation of the character here involved appears to have been maintained to the greatest extent. In the first of these States, the principle upon which such retroactive laws are supported, as stated in one of the earlier decisions upon the subject (*Underwood v. Lilly*, 10 S & R. 101), and also in one of the latest (*Shonk v. Brown*, 61 Penn. St. 227), is, that they shall impair no contract, nor disturb any vested right, but only vary remedies, cure defects in proceedings otherwise fair, which do not vary existing obligations contrary to their situation when entered into and when prosecuted. In Ohio, according to the latest decision (*Chestnut v. Shane*, 16 Ohio, 599), such legislation can be maintained only where it operates upon that class of deeds where enough has been done to show that a Court of Chancery ought, in each case, to pass a decree for a conveyance; that where the title in equity is such that a Court of Chancery ought to interfere and decree a good title, it is within the power of the legislature to confirm the deed, without subjecting the parties to the expense of litigation. It is manifest that the decisions in neither of these States can be invoked as authorities for the appellees as against the appellant.

The conclusion is, from what has been said, that we are of opinion that the deed before us is not affected or rendered operative by virtue of the act of 1867, ch. 160, as against the *fems covert*, one of the appellants, though it is cured and rendered operative as against the heirs of Benjamin Todd, the grantor; and therefore the decree appealed from must be reversed, and the cause remanded, that a proper decree be passed by the court below, providing for and directing the assignment of dower in the lands mentioned, as prayed by the bill.

Decree reversed, and cause remanded.

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(42 Md. 71.)

Constitutionality of local option laws — License to sell liquor revocable.

An act provided for an election in the several election districts at which the voters should vote for or against the sale of intoxicating liquors; and that if in any district the vote was against such sale, it should thereafter not be lawful to sell liquor therein. It was provided that the act should take effect immediately after such election. *Held*, that the act was not a delegation of the legislative power to the people and was valid. A license to sell liquor under the general license laws of the State is not a contract, and it may be terminated before its expiration by a change or repeal of the law.

INDICTMENT for selling spirituous liquors. The opinion states the case.

P. H. Tuck, J. W. Bryant, John B. Brown and Will H. Tuck, for appellant. The act of 1874, ch. 453, under which appellant was indicted, is void as being a delegation of the legislative power to the people. *Rice v. Foster*, 4 Harr. 479; *Parker v. Commonwealth*, 6 Penn. 507; *Thorne v. Cramer*, 15 Barb. 112; *Bradley v. Baxter*, id. 122; *Barto v. Himrod*, 4 Seld. 490; *Sauto v. State*, 2 Iowa, 165; *Geebrick v. State*, 5 id. 491; *State v. Beneke*, 9 id. 208; *State v. Weir*, 33 id. 134; S. C., 11 Am. Rep. 115; *Maize v. State*, 4 Ind. 342; *Meshmeier v. State*, 11 id. 482; *State v. Swisher*, 17 Tex. 441; *City of Patterson, etc.*, 4 Zab. 392; *State v. Copeland*, 3 R. I. 33; *Railroad Co. v. Clinton County*, 1 Ohio St. 77 to 90; *People v. Collins*, 3 Mich. 343; *State v. Parker*, 26 Vt. 356; *Ex parte Wall*, 48 Cal. 279; Sedgwick's Const. Law, 164; Cooley on Const. Lim. 116, 117. The members of the legislature did not *will* that the act should have the force of law; it was left by them to the people to *determine* for themselves whether it should ever have any effect. The only thing determined by the legislature was, that there might be an election, and that persons should be punished or not, according to the judgment of the people as shown by the result of the election. If there had been no election, or if a majority had been the other way, there would have been no effective law, because there would have been no determination of the question as to the right to sell, and no punishment for selling, for there could have been no offenders. *Bradley v. Baxter*, 15 Barb. 122; *Thorne v. Cramer*, id. 112, 114; *Barto v. Himrod*, 4 Seld. 486, 489, 496; *Rice v. Foster*, 4 Harr. 479; *Parker v. Commonwealth*, 6 Penn. 507.

It is not denied that statutes may be conditional; that their taking

effect is sometimes made to depend on a subsequent event. But the event must be one that will produce such a change of circumstances, affecting the expediency of passing the law, that the legislature can, in advance, see and be able to declare, as matter for their own judgment, that it will be expedient and proper that the act shall take effect on the occurrence of the event. Here the expediency of passing the law is to be determined in another manner, and the event on which it is to have effect is nothing less than a determination by others of the identical matter which it was the province of the legislature to have decided. It was a mere shifting of duty and responsibility, for it is impossible to say that the legislature would have passed a law prohibiting the sale of liquor in any one district of Caroline, or of any other county. *Bradley v. Baxter*, 15 Barb. 123; *Mayor, etc., of Baltimore v. Clunet*, 23 Md. 468, 470; *N. C. R. R. v. Mayor, etc.*, 21 id. 93; *Mayor, etc., v. Kirkley*, 29 id. 85; *Barto v. Himrod*, 4 Seld. 490, 495; *Ex parte Wall*, 48 Cal. 279; *Cooley on Const. Lim.* 121; *Sauto v. State*, 2 Iowa, 205; *People v. Collins*, 3 Mich. 378; *Parker v. Commonwealth*, 6 Penn. 525.

4. There is a class of cases in the books in which acts have been submitted to the action of towns or townships, or municipal corporations, and held to be valid; but this act does not belong to that class.

County affairs in this State are managed by commissioners, who bear no resemblance to the local authorities in some of the other States, and, if a parallel could be drawn between towns and townships and our counties, surely election districts are not entitled to the same consideration. One of the anomalies of this law is, that while the people in four districts of Caroline county are expected to live abstemiously, the inhabitants of the other are under no such restraint.

The right of the people in towns and townships to vote on such questions is based, in some of the cases, on the idea that they are *quasi* corporations, and may be well authorized to regulate their police affairs; but our election districts are in no sense corporations. *Commonwealth v. Bennett*, 108 Mass. 27; *Commonwealth v. Dean*, 110 id. 359; *Bancroft v. Dumas*, 21 Vt. 464. In this last case, the law was sustained as being perfect and operative without the vote of the town.

5. In some of the cases such laws have been sustained in part, and condemned in part, because of the clause submitting them to a vote of the people, if it appeared that the laws were perfect and operative without popular approval. *Sauto v. State*, 2 Iowa, 165; *Maise v. State*, 4 Ind. 342. But this distinction cannot apply here, for there would have been nothing for the law to operate upon if the election had not been held, or if the vote had been the other way. The provisions are so de-

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pendent, one on the other, that the act is not divisible, but good or bad in toto. *State v. Swisher*, 17 Tex. 441; *Gesbrick v. State*, 5 Iowa, 498; *Sauto v. State*, 2 id. 165; *Cooley on Const. Lim.* 177, 178, 179.

6. Does this act show that the legislature intended to interfere with licenses issued and in force at the time the election took place?

The people did not vote on the question whether licenses should be granted. The first section declares that the question "whether or not any person may be licensed, by whom spirituous or fermented liquors may be sold, shall be submitted, etc., etc.," and then the same section provides for taking a vote for or against selling. Thus while the act appears to have intended that one question should be submitted to the people, they actually voted upon another. If there is any doubt as to the intent of the legislature; if the supposed intent is not clearly expressed, or cannot be plainly gathered from the whole act, the court will not wrest the meaning of words so as to take away the rights of the citizen vested at the time the act was passed or took effect.

If the legislature intended that the people should vote upon the question of granting licenses after the ascertainment of the popular will, so as to prevent selling thereafter under such licenses; or that a majority vote against selling should have the effect of preventing any from being issued after that time, the existing licenses could not be interfered with, and the judgment was wrong. This interpretation seems to be in accordance with the reason and justice of the case, for the legislature must be presumed to have known that licenses would expire and others issue on the 1st of May, and that prohibiting the sale of liquors after the second Tuesday in July would take away the privilege conferred by the licenses issued between the 1st of May and the day of election. Legislative expression should be very plain and explicit to perpetrate such a wrong upon the citizen, while pursuing a business protected by the then existing general laws of the State. An examination of the authorities will show that the subject has been fully considered by the courts of several of the States, and that the preponderance in number and force of reasoning is against the validity of such laws as that now under review.

Attorney-General Syester, William Daniel and George M. Russum, for appellee.

BARTOL, C. J. The appellant was indicted for selling spirituous liquors on the 5th day of October, 1874, within the third election district of Caroline county, in violation of the provisions of the act of 1874, ch. 453.

The case was submitted to the Circuit Court upon an agreed state-

ment of facts, set out in the record, and the judgment being against the defendant, he has prosecuted this appeal.

It is admitted that an election was held as provided by the act, on the second Tuesday of July, 1874, and that the returns thereof were duly made by the proper officers; that in the *third election district*, a majority of the votes cast were against the sale of spirituous or fermented liquors; and on the 4th day of August, 1874, proclamation of the result was made by the judges of the Circuit Court, as provided by the act. It was also admitted that the sales were made by the defendant as charged in the indictment.

If the act of Assembly be valid, the offense comes clearly within the *second and third sections*. But it is contended on the part of the appellant, that the act is unconstitutional and void, because it is alleged to be an attempt by the legislature to delegate to the legal voters of the district the power of making the law. By the Constitution, the legislative power is delegated to the General Assembly exclusively, and that the power thus delegated cannot constitutionally be exercised by any other body or authority is universally conceded.

Mr. Cooley, in his work on "Constitutional Limitations," page 117, says: "One of the settled maxims of constitutional law is that the power conferred on the legislature to make laws cannot be delegated by that department to any other body or authority."

This principle rests upon the established rule "*delegatus non potest delegari*," and the application of this rule to the several departments of the government created by the Constitution, and clothed with the exercise of political power, is sanctioned both by reason and authority. The true question, therefore, is whether the act of Assembly now under consideration is a delegation of the legislative power to the voters, and to determine this question it is important to examine the provisions of the act.

Section 1 provides for an election to be held on the second Tuesday of July, 1874, at which the voters of the several election districts, in the counties named, shall cast ballots "*for the sale of spirituous or fermented liquors*" or "*against the sale of spirituous or fermented liquors*;" and directs that the judges of the election shall make return of the votes to the judges of the Circuit Court, who shall make proclamation of the result.

Section 2 enacts that if it shall be found by the returns of the judges of election, and proclamation of the judges of the Circuit Court, that a majority of the votes, in any district of either of said counties

* * has been cast against the sale of spirituous or fermented liquors.

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that then it shall not be lawful for any person, or persons, or body corporate to sell spirituous or fermented liquors, in any district of either of said counties voting by a majority against selling the same.

Section 3 prescribes the penalty for a violation of the act.

Section 4 provides that the act shall take effect, immediately after it shall have been determined by a majority of the people in any one or more election districts of the counties named, whether or not spirituous or fermented liquors shall not be sold, as before provided for.

Now what has been delegated to the voters by this act of Assembly? Certainly not the power to make the law, or to repeal existing laws. They are called on by the first section simply to express, by their ballots, their opinion or sentiments as to the subject-matter to which the law relates. They declare no consequences, prescribe no penalties and exercise no legislative functions. The consequences are declared in the law, and are exclusively the result of the legislative will. The act of Assembly is "a perfect and complete law as it left the halls of legislation and was approved by the governor;" but by its terms, it was made to go into operation in any district, upon the contingency of a majority of the legal voters within the district, being ascertained to be in favor of the prohibition contained in the second section. The question before us therefore resolves itself simply into this: May the legislature constitutionally enact a law, and make its operation depend upon the contingency of the popular vote? It has never been denied that "the legislature may provide that an act shall not take effect until a future day, or until the happening of some particular event, or in some contingency thereafter to arise, or upon the performance of some specified condition." A familiar example of such legislation may be found in the acts of Congress, which came under review before the Supreme Court in the case of the *Brig Aurora v. United States*, 7 Cranch, 382.

It was decided by this court that "a valid law may be passed, to take effect upon the happening of a future contingent event, even where that event involves the assent to its provisions by other parties." *Mayor, etc., of Baltimore v. Clunet et al.*, 23 Md. 469. In support of this proposition many cases might be cited.

It has been well remarked by a learned judge: "If the legislature may make the operation of its act depend on some contingency thereafter to happen, or may prescribe conditions, it must be for them to judge in what contingency, or upon what condition, the act shall take effect. They must have the power to prescribe any they may think proper; and if the condition be that a vote of approval shall first be given by the people affected by the proposed measure, it is difficult to see why it may not

be as good and valid as any other condition whatever. There can be no inherent vice in the nature of such a condition, which shall serve to defeat the act, when it would be legal and effectual, if made to depend upon some other event. To say in such a case that the act is made by the voters and not by the legislature is to disregard all proper distinctions, and involves an utter confusion of ideas upon this subject."

"Wherever the contingency upon which a law is to take effect depends upon the action of third persons, it might be said with equal truth, that the law was enacted by those persons instead of the legislature." *Bull v. Read*, 13 Gratt. 90, 91.

In the same case Judge LEE uses the following argument, which seems to us to present the question in a very clear and forcible manner :

"It will not be questioned that it is entirely competent for the legislature to provide for taking a vote of the people, or any portion of them, upon a measure directly affecting them, and if a given number be in favor of its adoption, to enact a law thereupon, carrying it into effect. And there would seem to be but little difference in substance, in a reversal of the process, by first enacting the law in all its parts; but providing that its operation is to be suspended until it be ascertained that the requisite number of the people to be affected by it were in favor of its adoption." 13 Gratt. 88.

We refer also to the opinion of REDFIELD, C. J., in *The State v. Parker*, 26 Vt. 365, where the same views are expressed.

It must be borne in mind that the question with which we are dealing is one of constitutional power. As to the wisdom or expediency of such legislation we are not authorized to judge. These are questions which, under our system of government, are exclusively confided to the legislature, and so long as that department acts within the constitutional limits of its authority, this court has no power to sit in judgment on the wisdom, or expediency of its action.

The constitutional question here involved is not a new one in this State. In our judgment it has been distinctly passed upon by our predecessors in this court.

By the act of 1825, ch. 162, a general system of primary schools was established. The 29th and 30th sections of that act were as follows :

"Sec. 29. *Be it enacted*, that at the next election of delegates to the General Assembly, every voter, when he offers to vote, shall be required by the judges of election, to state whether he is for or against the establishment of primary schools, and the said judges shall record the number of votes for and against primary schools, and make return thereof to the

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legislature, during the first week of the session, and if a majority of the said votes in any county shall be in favor of the establishment of primary schools as is therein provided for, then and in that case the said act shall be valid for such county or counties, otherwise of no effect whatever."

"Sec 30th. *And be it enacted*, that if a majority of the votes of any county in this State shall be against the establishment of primary schools, as established by this act, then and in that case the said act shall be void as to that county."

This law came before the Court of Appeals in *Burgess v. Puc*, 2 Gill, 11 (decided in 1844). Its validity was assailed, on the same ground as is now urged against the act of 1874. That is, that its operation in any county was made to depend upon the result of a popular vote. It was urged there as here, that the effect of the 29th and 30th sections was to delegate the law-making power to the voters, which the legislature could not constitutionally do. After a most full and able argument, the court decided that the law was valid, and that there was no validity in the constitutional objection.

The same question again arose in a case between the same parties, 2 Gill, 254, and again the constitutionality of the law was maintained. It would be difficult to find a more solemn and authoritative decision upon any question than is presented by those cases; and it would be equally difficult to distinguish the principle then decided, from that involved in the present case; so far as it concerns the question of the supposed delegation of legislative power, by a submission to the popular vote to determine the contingency upon which a law is to go into operation. Again, in *Hammond v. Haines*, 25 Md. 541, this court by a unanimous decision held the act of 1864, ch. 348, to be valid and constitutional. That act submitted to the qualified voters of the borough of North East to decide by ballot whether any license should be granted to sell spirituous or fermented liquors within the borough.

The position of the appellant finds no support in the decided cases in Maryland. In other States there has been much conflict in the decisions. In some of them the courts have held laws to be invalid, because their operation was made to depend upon the contingency of a popular vote. Among the earliest of these cases are *Parker v. Commonwealth*, 6 Barr (Penn.), 507 (decided in 1847); *Rice v. Foster*, 4 Harr. (Del.) 479 (decided about the same time); and *Barto v. Himrod*, 4 Seld. (N. Y.) 483. These were followed by the courts of Indiana, Iowa, Michigan and some others. We do not consider it necessary to refer to these cases more particularly. In many of the States, decisions have been rendered by the courts of last resort, in accordance with the ruling of this court

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in *Burgess v. Poe*, and *Hammond v. Haines*. In Pennsylvania the leading case of *Parker v. The Commonwealth*, which furnished the basis of many of the decisions in other States, cited by the appellant, has recently been overruled and reversed by the Supreme Court of the same State in *Locke's Appeal*, 72 Penn. St. 491; S. C., 13 Am. Rep. 716. This last decision by that able court was made after full argument, and an examination of the course of judicial decision upon the question, and is in accordance with the conclusions we have expressed.

In the examination of the question before us, we have kept in view the cardinal principle, which must always govern the courts, when called on to pass upon the constitutionality of the acts of a co-ordinate department of the government.

Every intendment ought to be made in support of the legislative, enactment, and it is not to be declared invalid, except for the plainest and most conclusive reasons. In this case, we have failed to discover any sufficient grounds to justify us in declaring the act of 1874, ch. 453, unconstitutional or inoperative. So to pronounce would in our judgment be contrary to sound reason, as well as at variance with the previous decisions of this court.

There can be no question of the power of the legislature to fix the time when a law shall go into effect: nor can it be doubted that the legislature has power to prohibit the sale of spirituous or fermented liquors, in any part of the State; notwithstanding a party to be affected by the law may have procured a license, under the general license laws of the State, which has not yet expired. Such a license is in no sense a contract made by the State with the party holding the license. It is a mere permit, subject to be modified or annulled at the pleasure of the legislature, who have the power to change or repeal the law under which the license was granted. *Parkinson v. State*, 14 Md. 185.

Being of opinion that none of the objections to the validity of the law, urged by the appellant, are valid, the judgment of the Circuit Court has been affirmed.

Judgment affirmed.

BOWIE, J., delivered a dissenting opinion.

 BROWN V. THE HOWARD FIRE INSURANCE COMPANY.

(42 Md. 384.)

Stock — forged assignment of — right of purchaser.

Plaintiff took in the regular course of business an assignment of stock in the defendant's insurance company as security for a loan; presented the certificates to the

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company and received new certificates in lieu thereof. The assignment turned out to be a forgery. *Held*, that the plaintiff and not the insurance company must sustain the loss.

BILL filed by the assignee in bankruptcy of Denson & Quincy against Brown, Lancaster & Co., and The Howard Fire Insurance Co., to compel the former to deliver up certificates of stock delivered to them and the latter to issue new ones therefor. The opinion states the case.

Skipwith Wilmer and *J. Douglas Hambleton*, for appellants. The appellants were guilty of no negligence. The insurance company was guilty of negligence. It should have known the signature of its stockholders, and with the certificates in its possession, it should not have allowed the appellants to remain for nearly a month, during which time they could have collected their debt, under the impression that they had ample security.

The stock which Brown, Lancaster & Co. held was regular stock, and if both parties were in fault, the loss should have been allowed to remain where it had fallen, viz., upon the insurance company, as Mr. Denson had a right to demand of them new certificates in case of the loss or destruction of his old ones.

Where a company allows its stock to be transferred upon a forged power of attorney, it and not the innocent purchaser for value must bear the loss. *Ashby v. Blackwell and the Million Bank Co.*, Ambler, 503, and 2 Eden, 299. This case is referred to approvingly in *Duncan v. Lintly*, 4 McN. & G. 40, and by Sir ROUNDEL PALMER, in a case reported in 6 Jurist (N. S.), 495, and by Bridgman in his Chancery Digest, Angel and Ames on Corporations, §§ 583-5. To the same effect are *Davis v. Bank of England*, 2 Bingham, 392; *Swan v. North British Australasian Co.*, 7 Hurlst. & Norm. 603; *In re Bahia and San Francisco Railway Co.*, 3 Q. B. (L. R.) 584; *Horton v. The Westminster Improvement Commissioners*, 14 Eng. L. & Eq. 379; *Johnston v. Renton*, 9 Equity Cases (L. R.), 188; *Taylor v. Midland Railway*, 4 Fisher's Digest, 7186; *Sabin v. Bank of Woodstock*, 21 Vt. 360; *Bayard v. Farmers' Bank*, 52 Penn. 235; *Pollock v. National Bank*, 3 Seld. 275; *Albert v. Savings Bank*, 1 Md. Ch. Dec. 407; *Cohen v. Gwynn*, 4 id. 357; *Loney v. Commercial and Savings Bank*, Taney's Decisions, 810; *Chew v. Bank of Baltimore*, 14 Md. 299; *Hodges v. Planters' Bank*, 7 G. & J. 306; *National Park Bank v. Ninth National Bank*, 46 N. Y. 77; *Hoffman & Co. v. Bank of Milwaukee*, 12 Wall. 193.

It matters not that the money was paid in the present case before this stock was transferred. If this transfer had been refused by the com-

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pany, the appellants would have been able to recover their money, as the firm of Denson & Quincy continued to meet their obligations for nearly a month, and the appellants had a right to this notice from the company. *Bank v. Lanier*, 11 Wall. 377.

If the company has no stock to issue to the appellants, then it is the duty to pay them the amount of their loss. *Pollock v. National Bank*, 8 Seld. 275.

An estoppel can be insisted upon by Brown, Lancaster & Co., in the case at bar, notwithstanding *the loan by them was made before the signature of Denson was submitted to the Howard Fire Insurance Company*. *Continental N. Bank v. N. Bank of the Commonwealth*, 50 N. Y. 575; Benjamin on Sales (Perkins' Am. Ed.), 675.

A person acts negligently, in advancing money when he does not know whether the borrower is the actual owner of the shares. *The Queen v. Shropshire Union Co.*, 8 Q. B. 432, 444.

A corporation can take reasonable time in which to ascertain the genuineness of a signature, without becoming liable to the transfer of shares for the delay. *Chew v. Bank of Baltimore*, 14 Md. 819; *Bayard v. Farmers' Bank*, 52 Penn. 282.

Viewing the certificate as wholly *non-negotiable*, the mere fact of presenting it for transfer did not place the holder of it in the position of guarantor of the genuineness of the signature of Denson to the extent of relieving the corporation from determining that fact for itself. *Lord Chancellor*, 1 Macqueen, 523; *Bernheimer v. Marshall & Co.*, 2 Minn. 78; Ang. & Ames on Corp., § 582; *Bridgeport Bank v. N. Y. & N. H. R. R. Co.*, 30 Conn. 275; *Bank v. Lanier*, 11 Wall. 377.

In the case at bar, the name of Brown, Lancaster & Co. nowhere appears on the certificates of Denson. They were assigned by him apparently in blank, to be good in the hands of the *bearer*. The company waived the filling up the blanks in the assignment, and virtually treated the face of the certificate and assignments on the back of it, together as making a negotiable instrument. Their own construction and treatment of an instrument *prepared and sent into the commercial world by themselves*, ought to be conclusive in them. Brown, Lancaster & Co. took this instrument honestly, and their negligence is no answer. *Seydel's Case*, 13 Am. Rep. 588.

The company will not be allowed to escape its liability to *both parties for transferring on a forged power*, by assuming to be mere stakeholders, and entitled to interplead. *Dalton v. Midland Railway Co.*, 74 Eng. C. L. Rep. 458.

Edward Otr. Hinckley, for the Howard Insurance Company. Brown,

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Lancaster & Co. were *negligent*. They lent money on their *own judgment*. The company did not lead them into error. Their situation was not changed by the company's conduct. See *Weaver v. Barden*, 49 N. Y. 286; *Jones v. Ryde*, 5 Taunt. 488; *Monk v. Graham*, 8 Modern Reports, 9; *Hildyard v. South Sea Company and Keate*, 2 P. Wms. 76; *In re Bahia, etc.*, 3 Q. B. (L. R.) 584; *Hart v. Frontino, etc.*, *Gold Mining Co.*, 5 Exch. (L. R.) 111; *The Gloucester Bank v. The Salem Bank*, 17 Mass. 33; *The Bank of Commerce v. The Union Bank*, 3 Comst. 230; *Ellis & Morton v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628; *Canal Bank v. Bank of Albany*, 1 Hill, 290.

STEWART, J. BROWN, Lancaster & Co. loaned to one McGruder, as agent of the firm of Denson & Quincy, one thousand dollars, to be returned in thirty days, and took McGruder's note therefor, and as collateral security for its payment, two hundred shares of the capital stock of the Howard Fire Insurance Company, belonging to Denson, whose name, indorsed on the certificate thereof, was supposed by them to be genuine.

Soon thereafter, they sent the certificate to the insurance company, and requested the stock to be transferred to them, and accordingly the certificates were canceled, and others in lieu thereof were issued to them. In about a month afterward Denson & Quincy failed, and notice was given to the insurance company and to Brown, Lancaster & Co. that Denson's name on the certificates was a forgery. Brown, Lancaster & Co. sold the certificates, and requested the company to issue new ones to the purchasers, which it declined.

Denson's assignee in bankruptcy filed the bill against the insurance company and Brown, Lancaster & Co., to compel the latter to deliver up the certificates issued to them, and that new ones should be issued by the company to the complainant. Brown, Lancaster & Co. filed a cross-bill against their co-defendants. The Circuit Court decreed in favor of the complainant, and we think the decree must be affirmed. It was conceded, and there can be no doubt of the right of Denson's assignee to have recovery of his certificates, or new certificates of his stock issued by the insurance company, in the place of those canceled. Denson's title to the stock could not be affected by the forgery practiced upon him, his right to the same was not divested by the fraud.

The only question about which there can be any dispute is, whether the insurance company or Brown, Lancaster & Co. shall sustain the loss. They are both innocent or unfortunate parties, and one or the other must lose; the latter having first advanced their money. without

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knowledge of the frauds; and the former having canceled the old certificates of stock and issued a new one to Brown, Lancaster & Co., supposing Denson's signature to be genuine. Brown, Lancaster & Co., for the fraud perpetrated upon them, still have their remedy against Quincy, or McGruder, who gave his note and received their check. The insurance company have their remedy against Brown, Lancaster & Co., who have upon the forged name, and without consideration, received the certificate belonging to Denson, to whom, or his assignee, they are responsible.

Brown, Lancaster & Co. have no right to withhold the certificates they obtained from the insurance company, unless they could prove that they had, in some way, lost through its negligence. If, by the issue of certificates in their name, Brown, Lancaster & Co. lost the opportunity of making the money out of Quincy, there might be some question, but the evidence does not establish such fact. If the insurance company had been guilty of negligence, unless that was the occasion of the loss to Brown, Lancaster & Co., it would not be sufficient to shift the loss upon it. Negligence to operate as an estoppel must be the proximate cause of the loss. *Swan v. North British Australasian Co.*, 7 H. & N. 603. The stock certificates were not negotiable paper, and Brown, Lancaster & Co. and the insurance company received notice of the forgery about the same time, and the issue of the certificates by the company through mistake, and the delay in the discovery of the fraud, cannot deprive the insurance company of the right to recover the certificates.

Brown, Lancaster & Co. first advanced their money at their own hazard.

The insurance company having issued the stock upon the forged name to Brown, Lancaster & Co., who had before treated it as a genuine paper, and to that extent misled the insurance company, Brown, Lancaster & Co. ought not to hold them accountable for the loss incurred by their own error, unless they could make it appear that they might have avoided the loss, but for the negligence or oversight of the insurance company.

Any negligence on its part would not render it answerable, unless that were the proximate cause of the loss.

If their equity were equal, it would not follow that the insurance company, having issued the certificates to Brown, Lancaster & Co., they ought to be permitted to hold them. If they were equally free from fault, the fact that the certificates were obtained without equivalent, through mistake, would require their restitution. *Canal Bank v. Bank of Albany*, 1 Hill, 287.

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The insurance company is only bound by the same moral and legal obligations as Brown, Lancaster & Co., or other individuals. If a subsequent *bona fide* purchaser had been registered as the owner of the stock, purchased from Brown, Lancaster & Co., and was claiming a right thereto, that would present a different question, as between him and the company; but that could not relieve them from the claim of the insurance company.

After they were aware of the fraud, to have passed them to an innocent party would not have protected them against the claim of the company.

The established principles of equity require that the loss shall be borne by the party by whose negligence or misconduct it was occasioned. *Lovry v. Com. and Farm. Bank of Balt.*, Taney's Cir. Court Rep. 310.

There has been no loss by the negligent conduct of the insurance company. Brown, Lancaster & Co. had already incurred the loss through their inadvertence or negligence, in permitting themselves to be imposed upon by the forgery, and they have no right to throw it upon the insurance company, who have, through mistake, followed their lead.

Decree affirmed.

WECKLER v. THE FIRST NATIONAL BANK OF HAGERSTOWN.

(42 Md. 581.)

National Bank — ultra vires — when not liable for representations of officer.

Selling railroad bonds upon commission is not within the scope of the corporate powers of a national bank; and therefore no action lies against such corporation for false representations made by its teller to induce the plaintiff to buy bonds.

ACTION to recover damages for fraudulent representations made by defendants' teller upon sale of bonds to plaintiff.

H. H. Keedy, for appellant. This is an action for deceit. Whether an action of this kind can be maintained against a private corporation is no longer an open question. *Tome v. Parkersburg Branch R. R. Co.*, 39 Md. 70; *Merchants' Bank v. State Bank*, 10 Wall. 644; *Barwick v. Eng. Joint Stock Bank*, L. R., 2 Exch. 259; *Swift v. Wintherbotham*, L. R., 8 Q. B. 244; *Phil. Wil. & Balt. R. R. Co. v. Quigley*, 21 How. 202.

The instruction of the court is clearly erroneous, independent of the

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fact that it goes upon the assumption that the transaction complained of was a purchase and sale of these bonds, which the facts in the case do not warrant, it lays down the broad proposition that the purchase and sale of bonds are not within the chartered powers of a national bank. It has long been established by the American courts, that the bonds of railroads, as well as State and municipal bonds, made payable to bearer or holder, are negotiable instruments—commercial paper. *White v. Vermont and Mass. Railway Co.*, 21 How. 575; *Mercer County v. Hackett*, 1 Wall. 95; *Gelpcke v. Dubuque*, id. 206; *Aurora City v. West*, 7 id. 105; *City of Lexington v. Butler*, 14 id. 295; *White v. Railroad*, 21 How. 576; *Thomson v. Lee County*, 3 Wall. 331.

The ruling of the court is then reduced to this, that the purchase and sale of negotiable instruments, or negotiable evidences of debt are not within the chartered powers of a national bank. The National Banking Act, § 8, says: "Shall exercise under this act all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion." To discount, signifies the act of buying a negotiable instrument for a less sum than that which, upon its face, is payable, and to negotiate means "to sell, to pass, to transfer for a valuable consideration; as to negotiate a bill of exchange." (*See Bouvier's Law Dictionary, Discount, and Webster's Dictionary, Negotiate.*) Giving these meanings to these words, the ruling of the court below was in direct conflict with the very words of the statute. What can be meant by "other evidences of debt," if it does not refer to the class of securities under consideration?

If it is lawful for national banks, under any circumstances, to sell bonds, the defense of *ultra vires* will not be available.

It will not be controverted that a national bank can invest its own funds in bonds of the class in question; that if it becomes tired of the investment or finds it unprofitable, it can sell these bonds and buy others, in other words, can change its investments. Nor will it be denied that if, at one season of the year, its funds are more than sufficient to supply the demands of its customers, it could purchase bonds; and at another season of the year, when the wants of its customers increases, could sell them. It has been decided by this court in *First National Bank of Charlotte v. National Bank of Baltimore*, 39 Md. 600, that a national bank could legitimately even become possessed of stocks and sell them; and if it could own stocks under certain circumstances, it could, surely, under similar circumstances, own bonds and sell them; and again, it is

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usual for banks to loan money with bonds as collateral security, and upon default in payment, to sell such bonds. The law applicable to this branch of the case is well settled.

If the contract can be valid under any circumstances, an innocent party has a right to presume its validity, and the corporation is estopped from denying it. The appellant in this case was an innocent party; at the time of the transaction she was not made acquainted with the circumstances under which the appellee was selling these bonds; the words used by the officers were, "*we can give you better bonds.*" *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543; *Merchants' Bank v. State Bank*, 10 Wall. 644; *Rashdell v. Ford*, L. R., 2 Eq. Cas. 750; *Houghton v. First Nat. Bank of Elkhorn*, 26 Wis. 662; *North River Bank v. Aymar*, 8 Hill, 262.

The buying and selling of bonds by a national bank is not *ultra vires*. It is a fact known to all persons, that national banks, from their organization, have been engaged in the sale of government and other bonds. They have advertised them; their windows have been filled with facsimiles of them—and every means has been employed to give the public notice that such was a part of their business. It is not necessary that the act of incorporation should give a bank particular power to do an act, to enable it to do it, for if so, its movements, for all practical purposes, would not last for a day. It is sufficient if it is the ordinary course of banking business. *Bank of Kentucky v. Schuykill Bank*, Parsons' Sel. Cases, 227.

In the face of an usage so broad and general, it would be a harsh rule to declare a transaction illegal or *ultra vires*, which had been entered into in good faith. Happily we are not without authority upon this question, for it has been directly settled by several decisions. *Caldwell v. The Nat. Mohawk Valley Bank*, 64 Barb. 333; *Van Leuven v. First Nat. Bank of Kingston*, 54 N. Y. 671, and 6 Lans. 373; *Leach v. Hale*, 31 Iowa, 70; *Matthews v. The Mass. National Bank*, in U. S. Circuit, March No. of 1875, Law Register, 153; *Foster v. Essex Bank*, 17 Mass. 498.

Albert Small and *George Schley*, for appellee. Two questions only are involved in this issue. First. Does an action of *deceit* lie against a corporation? and Second. Conceding the facts alleged, and that the action will lie, is the appellee liable, the acts complained of being clearly *ultra vires*.

1. An incorporated company cannot, in its corporate character, be called on to answer in an action for deceit. *Western Bank of Scotland v. Addie*, L. R., 1 H. L. Sc. 145. The only late case in conflict (*Swift v. Winterbotham*, P. O. L. R., 8 Q. B. 244) is expressly overruled on ap-

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peal to the Exchequer Chamber in same case *sub nom.*, *Swift v. Jewsbury*, P. O. L. R., 9 Q. B. 301. See Benjamin on Sales, B. 3, ch. 2, § 3, pages 386-350, and 8 Am. Law Rev. 631-648.

2. The acts complained of are *ultra vires*, and the appellee cannot be bound by any act or representation of its officer in this behalf. *Tome v. Parkersburg Branch Railroad Company*, 39 Md. 36; *Penn., Del. & Md. Steam Navigation Company v. Dandridge*, 8 Gill & J. 248; *Duncan v. Maryland Savings Institution*, 10 id. 299; *U. S. v. City Bank of Columbus*, 21 How. 356; *Merchants' Bank v. Marine Bank*, 3 Gill, 125; *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46; *Head v. Providence Ins. Co.*, 2 Cranch, 127, 169; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Bank of the U. S. v. Dandridge*, 12 id. 64.

Banking, apart from the very elaborate definition given in the act of Congress, is defined in *Duncan v. Maryland Savings Institution*, *supra*, as "consisting of the right of issuing negotiable notes, discounting notes and receiving deposits," citing *The People v. The President, etc., of the Manhattan Co.*, 5 Conn. 383; *The People v. The Utica Insurance Co.*, 15 Johns. 390. And see Angell & Ames on Corp., § 55, n. 3; Grant on Banking, 1, 6, 381, 614; *Bank for Savings v. The Collector*, 3 Wall. 495. To this general definition the act of Congress adds, "buying and selling exchange, coin and bullion."

The construction of the act, since banking is not in itself a corporate franchise, but a limitation upon and in derogation of common-law rights, must be strict and exclusive. *Curtis v. Leavitt*, 15 N. Y. 52; *Bullard v. Bank*, 18 Wall. 589. This section is a rescript of section 18 of the General Banking Law of New York, passed in 1838, and as to these provisions is *in totidem verbis*. The New York act has passed under careful scrutiny, and has met with frequent judicial interpretation. The question in this issue—the power of a bank to traffic in stocks—arose under the New York act, in *Talmage v. Pell*, 7 N. Y. (3 Seld.) 327, and the court, after conceding that stocks might be legitimately bought or taken for many purposes incident to the express power to conduct the business of banking, at p. 343, says: "The proposition, however, to be established, is the right to traffic in them, or to acquire them for the special objects contemplated by the arrangement of the parties in this case; and these sections neither prove nor tend to prove any authority of that nature." * * * "I am, for the reasons suggested, of the opinion that this bank had no authority to traffic in stocks as an article of merchandise."

The same point was ruled in *Bank Commissioners v. St. Lawrence Bank*, 7 N. Y. 513; *Curtis v. Leavitt*, 15 id. 168, and in *Barnes v. Ontario Bank*, 19 id. 152.

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In the construction of the powers of national banking associations, in other matters, as given in section 8 of the act, similar views are held by the Supreme Court of Pennsylvania, in *Fowler v. Sculley*, 72 Penn. St. 516, and in *The First National Bank of Lyons v. The Ocean National Bank*, 60 N. Y. 278; *Shinkle v. The First National Bank of Ripley*, 22 Ohio, 516; *Shoemaker v. The National Mechanics' Bank*, 2 Abb. (U. S.) 416; and *Stewart v. The National Union Bank*, id. 424. And the principle announced in these cases is fully recognized by this court in *The First National Bank of Charlotte v. The National Exchange Bank of Baltimore*, 39 Md. 610.

The only case in conflict is *Leach v. Hale*, 31 Iowa, 69, and that is so evidently a case of bailment, and nothing more, that not even the positive assertion of the court can avail against the facts. The view taken in this case, too, is fully and satisfactorily controverted in the analogous case of *Wiley v. The First National Bank of Brattleboro*, 47 Vt. 546. The cases of *Caldwell v. The National Mohawk Valley Bank*, 64 Barb. 333, a State bank at the time of the contract, and *Van Leuven v. The First National Bank of Kingston*, 6 Lans. 373, and 54 N. Y. 671—a designated depository under section 45 of the act, Rev. St. U. S., § 5153—are for these reasons not in point, and the former is ignored, and the latter explained by the Court of Appeals of New York in its latest utterance in 60 N. Y. 278.

The construction thus given is alike applicable to the purchase or sale of all kinds of marketable securities other than bills of exchange, where gain or any other purpose than those specially mentioned is the object of its dealing. Inasmuch, then, as the corporation itself could not lawfully engage in such purchase or sale, it could not authorize its agents so to deal, and the contracts or representations of the agent could not fall within the scope of his authority. *U. S. v. The City Bank of Columbus*, 21 How. 556. And as persons dealing with the agents or officers of a corporation are held to know the powers of the corporation (*The Miner's Ditch Company v. Zellerbach et al.*, 1 Withrow's Amer. Corp. Cases, 275 [37 Cal.] 543), there can be no implication of authority. *Pierce v. Madison & Ind. R. R. Co.*, 21 How. 443. Nor will a corporation be held liable for the fraud of its agent committed *colore officii*. *Mayor and Common Council v. Eshbach*, 18 Md. 276; *Same v. Reynolds*, 20 id. 1; *Co. Commissioners A. A. Co. v. Duckett*, id. 468; *Horn v. Mayor and Common Council*, 30 id. 218; *Foster v. Essex Bank*, 17 Mass. 599; *Mechanics' Bank v. N. Y. and N. H. R. R. Co.*, 18 N. Y. (3 Kern.) 600.

Is the appellee estopped from making such a defense?

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The doctrine of estoppel, as applicable to such a defense by a corporation, is very clearly put in *Hood v. N. Y. & N. H. R. R. Co.*, 22 Conn. 1, 502, thus: "Where a corporation has the power to do an act, they may be estopped from objecting that the form they adopted was not the exact mode prescribed by the charter; but where the question is one of power, they cannot be deemed estopped to deny that they have done what they never could by legal possibility have done." And this principle is held and enforced in *The Penn., Del. & Md. Steam Navigation Co. v. Dandridge*, 8 G. & J. 248, and cases cited at p. 320; in the cases last above cited, and in *Albert and Wife v. The Savings Bank*, 2 Md. 159.

MILLER, J. A question of importance and of first impression in this State arises on this appeal. The suit was instituted by the appellant against the appellee, a national bank organized under the act of Congress, approved June 3d, 1864, known as the "National Currency Act." The first and second counts of the declaration aver in substance, that the defendant, as part of its business as such banking association, was engaged in the sale of the bonds of the Northern Pacific Railroad Company, and in soliciting orders for the purchase of the same and receiving commissions for such sales and orders, and by means of certain specified false, fraudulent and deceitful representations made by its teller, the plaintiff was induced to and did purchase from the bank two of said bonds of \$500 each, and paid the bank therefor the sum of \$1,000 and was thereby damaged. The case was tried upon issue joined on the plea of not guilty. There was conflicting proof as to the making of the alleged false representations by the teller. The court rejected all the prayers offered on both sides and instructed the jury in effect that the National Banking Act, under which the defendant was organized, limits the action of the bank to the pursuit of the objects specified in the act of Congress, and that the purchase and sale of such bonds is not within the chartered powers of the defendant, and that the plaintiff cannot recover against the defendant in this action, although the jury may find from the evidence that the teller of the bank fraudulently induced the plaintiff to purchase the bonds in question by making the alleged false representations, and that she suffered loss thereby. This presents broadly and clearly the question whether the bank has authority for selling bonds of railroad companies on commission.

A bank, like other private corporations, is confined to the sphere of action limited by the terms and intention of its charter. The Supreme Court, in the case of the *Bank of the United States v. Dandridge*, 12 Wheat. 68, states the rule by which the powers of the bank are to be

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determined thus : " Whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself." And in that case the court adopt, as entirely correct and applicable to the bank, the doctrine laid down by MARSHALL, Ch. J., in 2 Cranch, 167, in reference to an insurance company, viz. : " Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may be correctly said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner in which that act authorizes." And in this State the law is well-settled that a corporation created for a specific purpose not only can make no contract forbidden by its charter, but in general can make no contract which is not necessary either directly or incidentally, to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, it must be considered in the first place, whether its charter or some statute binding upon it forbids or permits it to make such a contract ; and if the charter and valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfill the purpose of its existence ; or whether the contract is entirely foreign to that purpose ; a corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted. *Steam Nav. Co. v. Dandridge*, 8 G. & J. 318, 319. We must, therefore, determine the true construction of the act of Congress authorizing the formation of these banking associations, and whether the power to make contracts like the one in question is expressly conferred upon them, or is directly or incidentally necessary to enable them to fulfill the purpose of their creation, or is entirely foreign to that purpose.

So far as the purpose of the law is indicated by its title, it is, " to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." After prescribing in previous sections the mode by, and the conditions under which banking associations may be formed, the 8th section declares that every association so formed shall become a body corporate, from the date of its certificate of organization, but shall transact no business " except such

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as may be incidental to its organization, until authorized by the controller of the currency to commence the *business of banking*." Power is then given it to adopt a corporate seal, to have succession by the name designated in its organization certificate, and in that name to make contracts and sue and be sued, to elect directors and other officers, "and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this act." This is the only portion of the statute to which, for the purposes of this case, it is necessary to refer. By it the associations are not simply incorporated *as banks*, and the scope of their corporate business left wholly to implication, but the kind of banking which they may conduct is limited and defined. As we read the language of this 8th section, it authorizes the associations to carry on banking, "by discounting and negotiating promissory notes," etc., and to exercise "all such incidental powers" as shall be necessary to conduct *that business*. The mode in which the incidental powers may be exercised is not defined, but all incidental powers which they can exercise must be necessary or incidental to the business of banking, thus limited and defined. To the usual attributes of banking, consisting of the right to issue notes for circulation, to discount commercial paper and receive deposits, this law adds the special power to buy and sell exchange, coin and bullion, but we look in vain for any grant of power to engage in the business charged in this declaration. It is not embraced in the power to "*discount and negotiate*" promissory notes, drafts, bills of exchange and other evidences of debt. The ordinary meaning of the terms "to discount," is to take interest in advance, and in banking is a mode of loaning money. It is the advance of money not due till some future period, less the interest which would be due thereon when payable. The power "to negotiate" a bill or note is the power to indorse and deliver it to another so that the right of action thereon shall pass to the indorsee or holder. No construction can be given to these terms as used in this statute, so broad as to comprehend the authority to sell bonds for third parties on commission, or engage in business of that character. The appropriate place for the grant of such a power would be in the clause conferring authority to "buy and sell," but we find that limited to specific things, among which bonds are not mentioned, and upon the maxim, *expressio unius est exclusio alterius*, and in view of the rule of interpretation of corporate powers

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before stated, the carrying on of such a business is prohibited to these associations. Nor can we perceive it is anywise necessary to the purpose of their existence, or in any sense incidental to the business they are empowered to conduct, that they should become bond-brokers or be allowed to traffic in every species of obligations issued by the innumerable corporations, private and municipal, of the country. The more carefully they confine themselves to the legitimate business of banking as defined in this law, the more effectually will they subserve the purposes of their creation. By a strict adherence to that, they will best accommodate the commercial community, as well as protect their shareholders.

Such is our construction of this statute, and it is supported by the best considered authorities and the decided preponderance of judicial opinion in other States. This eighth section is almost identical in terms (and as respects the present question completely so) with the Banking Act of New York, of 1838, ch. 260, and the Court of Appeals of that State, in *Talmage v. Pell*, 3 Seld. 328, held that banking associations formed under that law have authority only to carry on the business of banking in the manner and with the powers specified in the act, and have no power to purchase State stocks, to sell at a profit or as a means of raising money, except when received as security for a loan, or taken in payment of a loan or debt. In speaking of the transaction under review in that case, the court say the banking company "purchased these bonds as they might have purchased a cargo of cotton to send to market to be sold at the risk of the vendor for the highest price that could be obtained. No authority to traffic in either commodity is expressly given by the law of 1838. It is, therefore, claimed as a power incident to the business of *banking*. But the 18th section of the act declares that this business shall be carried on by discounting bills, notes and other evidences of debt, by loaning money on real and personal security, by buying and selling gold and silver bullion, foreign coin and bills of exchange, etc. The subjects pertaining to the business of banking are designated, and the express powers of the association are limited to them, and to such incidental powers as may be necessary to transact the business thus defined by the legislature."

They then proceed to show that the claim to base the validity of the contract upon any incidental power was unfounded, and pronounce the transaction illegal, and the assignment by the company of mortgages which they held as collateral security for the purchase, void. So also in recent decisions of the courts of last resort in several of the States where this act of Congress, and especially its 8th section, has been considered, we find it construed in entire accord with the view we have taken of it.

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We refer to *Fowler v. Scully*, 72 Penn. St. 456; *Shinkle v. First National Bank of Ripley*, 22 Ohio St. 516; *Wiley v. First National Bank of Brattleboro*, 47 Vt. 546; S. C., 19 Am. Rep. 122; and *First National Bank of Lyons v. Ocean National Bank*, 60 N. Y. 278; S. C., 19 Am. Rep. 181. In the last-mentioned case there is a very able opinion of the court by ALLEN, J., in which he says he fully concurs in the views expressed by Judge WHEELER in the Vermont case, and in reference to the case of *Van Leuven v. First National Bank of Kingston*, shortly reported (the opinions of the judges not being given) in 54 N. Y. 671, which has been pressed upon our attention by the appellant's counsel, he says it decided no general principle, but by a divided court it was determined "that the contract in that case, under the circumstances, was the contract of the corporation, and not the individual contract of the president."

We are, therefore, clearly of opinion that this business of selling bonds on commission is not within the scope of the powers of the corporation, and the bank could not, under any circumstances, carry it out and being thus beyond its corporate powers, the defense of *ultra vires* is open to the appellee. 8 G. & J. 248. And it follows from this that the bank is not responsible for any false representations made by its teller to the appellant, by which she was induced to purchase the bonds in question. Hence there was no error in the court's instruction to the jury nor in rejection of the appellant's first and second prayers.

But by the third and fourth counts of the declaration, and the appellant's third and fourth prayers it is sought to give another character to the transaction, and to place the right to recover upon a different ground. They present the case in this view, viz.: that there was no *sale* and *purchase* of the bonds, but by the false representations of the teller the appellant was induced to *receive* them instead of money, *in payment* of the draft on New York, which she presented at the bank to be cashed or collected. It is argued that in this aspect, the transaction amounts to the same thing as if the teller had cashed the draft, by paying her over the counter in depreciated or worthless bank notes, representing them to be good. But the answer to this position is, that there is no evidence in the record to support it. The proof shows that on the 6th of October, 1871, the appellant presented at the bank a draft on New York, for \$1,047, and asked Mr. Newcomer, the teller, if it was good, and if he would cash it. The teller gave her \$47 in money, and a *certificate of deposit* for the balance to the effect that she "has deposited in this bank \$1,000, payable to the order of herself on return of this certificate properly indorsed." This instrument is in the usual form of a certificate of

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deposit, bears date the 6th of October, 1871, and is signed by the teller for the cashier. There is a discrepancy in the testimony as to whether any thing was said at that time about investing her money in Northern Pacific bonds. According to her testimony, as stated in the record, it may be inferred the alleged false representations were then made, but whether before or after she received the certificate of deposit does not clearly appear, and according to the testimony on the other side, nothing was said about these bonds until some ten or twelve days thereafter, when she returned and insisted upon investing her money. But it is immaterial when this occurred, because it is an undisputed fact that she received and accepted the certificate on that day, long before the bonds were delivered to her. The draft to the extent of \$1,000 was received by the bank as money, and as such it passed to her credit, and she became the creditor of the bank for that amount as an ordinary depositor. Whatever may have been said at or before this time, it is clear beyond dispute that by this transaction the draft was, as between the bank and herself, cashed or converted into money which became hers in the coffers of the bank, to use and dispose of as she saw fit. It is further shown by undisputed testimony, that these bonds were ordered by the cashier from the Baltimore brokers, and received on the 19th of October, 1871, a few days after the order for them was sent; that they remained in the bank until some time in April following, when the appellant either in person or through an agent *returned the certificate of deposit*, and got the bonds, paying the interest accrued at the time of the purchase out of the January coupons on the bonds which the teller then cashed for her; that she thereafter retained the bonds, collecting the interest upon them up to July 1st, 1873, and that they were sold in the market at par and accrued interest up to the financial crisis in the fall of 1873. From these facts the law can regard the transaction in no other light than as a *purchase* of these bonds by the appellant through the teller or cashier, she paying therefor her own money deposited to her credit in the bank. It was entirely competent for the bank to receive it as a deposit of so much money, and there is no evidence in the case legally sufficient to authorize a jury to infer that the teller (acting as he would be in that respect in the discharge of his duty, and within the scope of his employment), cashed that draft by passing off upon her these bonds instead of money in payment therefor. For these reasons there was no error in the rejection of the two last prayers of the appellant, and the judgment must be affirmed.

Having disposed of the case in this way, it becomes unnecessary to express any opinion upon the question argued at bar, whether an action

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like this will lie against a corporation in its corporate character, for deposit practiced by its officers or agents.

Judgment affirmed.

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(43 Md. 97.)

Insurance — recovery by mortgagor of amount paid to mortgagees.

Defendant conveyed to plaintiff certain premises, and took back a mortgage for a part of the purchase-money. At the time of the conveyance defendant had a policy of insurance on the premises, and notified the company of the sale and of the mortgage to him, and the insurance was continued to him under the same policy, in the same manner and for the same amount. The premises were burned, and the defendant promised the plaintiff that if he got the amount of the insurance he would give it to him, or allow it on the mortgage. The insurers paid the insurance money. Afterward at the maturity of the mortgage plaintiff paid the full amount of it and demanded the amount of the insurance received. *Held*, that the defendant was liable in equity to the plaintiff for the money received, and that such liability was a sufficient consideration for defendant's promise to pay it over or apply it, and that an action lay on such promise.

ACTION for money received by the defendant, appellee, for the use of the plaintiff, appellant.

On the 1st day of June, 1869, the appellee conveyed certain real estate to the appellant and took from him a mortgage bearing date the 5th of June, 1869, to secure the balance of the purchase-money. At the time of the sale and conveyance to the appellant, the appellee held a policy of insurance on the buildings on said farm, issued by the Mutual Fire Insurance Company of Montgomery county, and notified the company of the sale and conveyance, and of the fact that he held a mortgage on the property for the balance of the purchase-money. The buildings on the property were destroyed by fire in December, 1869, and the appellant, by letter dated on the 20th of the month, claimed of the insurance company the insurance, which was paid to the extent of eight hundred dollars, before the maturity and payment of the mortgage debt. The debt was subsequently paid in full. It was admitted that the appellant did not insure the property in the Mutual Fire Insurance Company for the benefit of the appellee. It was proved that the appellee, after the fire, promised the appellant that if he (the appellee) got the money from the insurance company he would give it to the appellant, or allow it on the last payment of the mortgage debt; that the appellee called upon the

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counsel of the appellant and offered to give one-half of the eight hundred dollars to the appellant; which offer the appellant refused, and on the 6th of March, 1878, instituted suit to recover of the appellee the whole amount of the insurance received by him. The declaration contained the common money counts; but the appellant relied altogether upon the count "for money received by the defendant for the use of the plaintiff."

The appellee, after the appellant had offered all his evidence and closed his case, asked the court to instruct the jury: "That upon the pleadings and evidence offered by the plaintiff in the cause, he was not entitled to recover." This prayer the court granted, and the verdict and judgment being for the defendant, the plaintiff appealed.

George M. Gill, for appellant. This case ought not to have been taken from the jury as it was by the court below.

Linthicum having insured the dwelling, etc., before he sold, and the insurance having been continued with consent of the insurance company after the sale, he became *trustee*, entitled to be paid the loss, and had the right to apply the amount received from the insurance company, to pay the balance of the purchase-money due him, and after receiving such balance, he was bound to account to Callahan for any surplus received; having received the entire balance of the purchase-money, and the further sum of eight hundred dollars from the insurance company, he became bound to pay Callahan the surplus after payment of his balance, and his promise so to pay, as given in evidence, is founded upon a sufficient consideration. *Carpenter v. The Providence Washington Ins. Co.*, 16 Peters, 2; *Parsons on Maritime Law*, 502, note 2; 1 *Phillips on Insurance*, 107 and 108 (2d Ed.); *Hammond on Fire Insurance*, 21, 22; *Insurance Company v. Updegraff*, 21 Penn. 518; *Carruthers v. Sheddon*, 6 Taunt. 14.

The insurance in the case being on the mutual plan, and Linthicum having given his note, which, under the contract, continued to be a *lien on the property sold after such insurance*, and until finally settled, Linthicum must be regarded as a trustee, holding the insurance as well for his own protection as for that of the purchaser; this condition of things was recognized by Linthicum, the insurance company and the purchaser, the appellant, and it would seem to follow that Linthicum, the trustee, having received the entire purchase-money, and also eight hundred dollars on account of the insurance, must account to the appellant for the excess in his hand.

The whole matter, under the circumstances, was for the jury, and in taking the case from the jury, there was manifest error.

T. A. Linthicum, for appellee. The appellant had no interest in the appellee's insurance. The contract for insurance was a separate and independent transaction between the company and the appellee, for which the appellant was not bound or charged—he paid no premiums—nor was he liable to pay or furnish the means for paying such premiums. The insurance was effected solely for the appellee's indemnity and benefit, and the appellant has no legal or equitable right to the money paid to the appellee by the company. *Garrell v. Hanna*, 5 H. & J. 412; *Tongue v. Nutwell*, 31 Md. 317; *Russell v. Southard*, 12 How. 139, 157.

The policy, after the sale and notice given thereof to the company, continued only as an insurance of the mortgage debt; and upon the payment of \$800 by the company, if such payment amounted to the whole debt, the company would be entitled to an assignment of the mortgage, or if the insured should collect the debt he would be considered as a trustee for the company, or be liable to the company in an action for money had and received, and in like manner the appellee would be liable to the company *pro tanto* when the insurance paid did not cover the whole debt. *Carpenter v. Providence Washington Ins. Co.*, 16 Peters, 501; *King v. State M. F. Ins. Co.*, 7 Cush. 1; 2 Phillips on Insurance, § 1712; *Bodman v. Murphy*, 35 Md. 162.

The promise made by the appellee to give the appellant the \$800, or to allow it on the last payment, was a mere naked promise—without consideration.

BARTOL, C. J. The special facts and circumstances of this case as they appear in the record, I think take it out of the operation of the general rules which govern contracts of insurance made by a mortgagee for his own indemnity, and exclusively for the protection of his own interest in the property insured. Where such insurance has been effected by the mortgagee, it is very clear that the mortgagor has no privity with the contract, and can claim no benefit under it. In such case it is well settled, as stated by the Supreme Court, "that where the mortgagee insures solely on his own account, it is but an insurance of his debt; and if his debt is afterward paid or extinguished, the policy ceases from that time to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatsoever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt of the mortgagee, if it does not exceed the insurance.

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But, then, upon such payment, the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to circumstances; for the payment of the insurance by the underwriters does not, in such case, discharge the mortgagor from the debt, but only changes the creditor." *Carpenter v. The P. W. Ins. Co.*, 16 Peters, 501; *Insurance Co. v. Woodruff*, 2 Dutcher, 541.

But such was not the nature of the insurance in the present case. It appears that the appellee, before the sale to the appellant, when he was absolute owner of the property, caused the same to be insured by the "Mutual Fire Ins. Co. of Montgomery county." This insurance was upon the property at the time of the sale, and by the charter of the company, § 4, the premium note given by the assured continued to be a lien upon the property. When he sold and conveyed the property to the appellant, received part of the purchase-money, and took a mortgage to secure the balance, it appears that the insurance upon the property was continued, under the same policy, in the same manner and for the same amount as before. There is nothing on the face of the policy to indicate that it was continued as an insurance only upon the interest of the mortgagee, and intended merely to cover the mortgage debt. It is entirely consistent with its terms, to construe the policy as intended to cover to the extent of the sum therein named, the whole property, as well the interest of the mortgagor as of the mortgagee. If such was the intention and contract of the parties, the interest of the mortgagor would be protected, although his name did not appear in the policy; and that such was the understanding of all the parties, is clearly shown by the acts and conduct of the parties themselves.

When the loss by fire occurred, though a part of the mortgage debt remained unpaid, the insurance company paid the amount due under the policy to the appellee, without any reference to the amount due upon the mortgage, and without claiming any right of subrogation with respect to the mortgage debt; and the appellee expressly promised the appellant, that when the money should be received from the company, he would give it to the appellant, or allow it as a credit upon the mortgage debt. These facts are entitled to great weight in determining the true intent and meaning of the contract of insurance. As was said by the Supreme Court in *Chicago v. Sheldon*, 9 Wall. 54: "In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling influence." The same principle of construction has been sanctioned by this court in *Citizen*

Fire Insurance, Security and Land Co. v. Doll, 35 Md. 107, where Judge ALVRY speaking for the court said: "Although it is very true, as contended by the appellee, that where an agreement is plain, and free from all ambiguity, it will not be construed by the acts and admissions of the parties with reference to it, yet where the intention is obscure or doubtful, and extrinsic evidence can be invoked, no evidence is more reliable or entitled to greater consideration, as manifesting what their intention was, than the acts and conduct of the parties themselves."

Applying this rule of interpretation to the present case, it seems to be very clear, that the policy of insurance was continued upon the property, and held by the appellee after the sale, for the benefit of the appellant as well as himself, and as a security to each to the extent of their respective interests in the property.

While it may be conceded that this arrangement could not give to the appellant the right to sue at law upon the policy, for want of legal privity with the contract of insurance; yet, under such circumstances, the mortgagee would be treated in a court of equity as trustee for the mortgagor, and in the event of the payment of the mortgage debt by the latter, he would be entitled to maintain a suit in equity, to recover the money received by the former under the policy of insurance. This has been expressly decided by the Supreme Court of Pennsylvania, in *Insurance Co. v. Updegraff*, 21 Penn. St. 513, and that decision was followed by the same court in *Reed v. Lukens*, 44 id. 200, 202.

In those cases there was a contract of sale, no conveyance had been made and mortgage taken by the vendor, as in this case; but that fact does not in my opinion alter or affect the equitable rights of the parties. In those cases it was held that the insurance having been effected by the vendor; not exclusively for his own security, but for the benefit of the purchaser also; being an insurance not merely of his own interest, covering only the debt due him for the purchase-money; but being an insurance of the property itself, including the interest of the vendee therein, insured to the benefit of the latter. And the whole purchase-money being paid, it was held that the vendor received the money from the insurance company as trustee for the purchaser, and was liable for it in equity to the latter. That principle applies to the present case.

The appellee being liable in a court of equity to the appellant for the money received by him from the insurance company; such liability was a sufficient consideration to support his promise, which gives to the appellant a right to maintain this suit; and to recover the money received by the appellee from the company, subject to be abated by any necessary or reasonable costs and expenses incurred by the appellee in collecting

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the same, and any premium paid by the appellee under the policy after the sale.

For these reasons I think the judgment below is erroneous, and as Judge MILLER concurs in this opinion, and Judge STEWART is of the same opinion, for reasons assigned by himself, the judgment will be reversed and a new trial ordered.

Judgment reversed, and new trial ordered.

ALVEY, J., delivered a dissenting opinion with which GRASON, J., concurred.

MILLER, appellant, v. MACKENZIE.

(43 Md. 404.)

Bankruptcy — effect of composition upon attachment.

Plaintiff attached defendant's property on *mesne* process. A month after defendant was duly adjudicated a bankrupt upon the petition of his creditors; but a composition was effected under the act of 1874. Plaintiff took no part in the composition, but his name and address and the amount of his debt were duly shown in the debtor's statement and the amount due him under the composition was tendered and refused. *Held*, that the debt of the plaintiff was extinguished by the composition, and the attachment should be quashed.

MOTION to quash an attachment. The opinion states the case.

Joseph P. Merryman, for appellant.

George G. Hooper, for appellee.

BOWIE, J. On the 4th of November, 1874, the appellant sued out of the Court of Common Pleas, an attachment as *mesne* process, against G. N. Mackenzie, C. B. Mackenzie and C. T. Mackenzie, partners in trade, which was returned by the sheriff, "*laid as per schedule.*" The defendants at January Term, 1875, moved to quash the attachment, for various reasons assigned, and afterward on the 21st of May, 1875, filed a special plea, alleging that the defendants were duly adjudicated bankrupts upon the 5th of December, 1874, upon the petition of their creditors, filed the 25th of November, 1874; that after said adjudication a meeting of the creditors of said defendants was duly called under the amendatory act to

the National Bankrupt Act, § 17, approved June 22, 1874; that at said meeting at which the plaintiff, although present, took no part, and did not vote upon or sign the resolution, a resolution for composition of the debts of said defendants for 25 per cent cash, was duly passed and confirmed under the provisions of said act, and the statement required by said act was duly produced, and therein the name of the plaintiff, his address and the amount of debt due to him were duly shown; that said resolution and statement were duly presented to the judge of the District Court of the United States, for the Maryland district, and said court duly caused said resolution to be recorded and the said statement to be filed; that the amount of money properly due said plaintiff under said proceedings for composition was duly tendered to him, and by him refused, and all the other creditors have accepted said proposition and been paid.

It was agreed by the counsel for the plaintiff and defendants, in the court below, that the motion to quash should be set down for hearing, upon a statement of facts, substantially the same as those embodied in the plea, and which we deem it therefore unnecessary to recite. Whereupon the court, on the 22d of May, 1875, ordered that the attachment be quashed, from which order the plaintiff appealed. On behalf of the appellant it is insisted that the jurisdiction of the State court having been asserted before the adjudication in bankruptcy, it cannot be divested except in very clear cases; that the power of Congress over State process for the collection of debts is implied from the express power conferred on it, to legislate on the subject of bankruptcy, which implied power should not be extended by construction.

The appellees on the other hand contend that the claim of the appellant is in direct conflict with the main object of the Bankrupt Laws—the just distribution of the bankrupt's assets among all his creditors. "That it is an attempt of one creditor, by a suit based upon an alleged act of bankruptcy, to obtain for himself payment in full at the expense of the other creditors." * * *

It is argued that bankrupts who pay the amount of the composition to all the other creditors are virtually the purchasers of their respective interests in their estates, and if the appellant can, by his attachment, obtain more than the rate of composition, so much the more are the respective interests of the other creditors diminished.

The statement of facts admitted, upon which the motion to quash was submitted and decided by the court below, embraces substantially all the essential conditions of a composition among the creditors of a bankrupt, prescribed by the 17th section of the act of Congress of 1874,

amendatory of the act to establish a uniform system of bankruptcy throughout the United States. It is declared by the provisions of the same section, that the composition, accepted by the resolution of the creditors, "shall be binding on all the creditors, whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor, produced at the meeting, at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors." By another clause of the same section of the supplement to the act, "the provisions of any composition made in pursuance of the act may be enforced by the court, on motion made in a summary manner, by any person interested, and on reasonable notice; and any disobedience of the order of the court, made on such motion, shall be deemed to be a contempt of court."

The 8th section of the 1st article of the Constitution of the United States declares, "The Congress shall have power to establish uniform laws on the subject of Bankruptcies throughout the United States." Chief Justice MARSHALL, in the case of *Sturges v. Crowninshield*, in defining the subject, says it is divisible in its nature into bankrupt and insolvent laws; "that laws which merely liberate the person are insolvent laws, and those which discharge the contract are bankrupt laws." 4 Wheat. 194.

If the composition, as we have seen, binds the plaintiff as one of the creditors of the appellees, there can be no doubt that the plaintiff's claim is discharged; the debt is extinguished; otherwise the Bankrupt Law would be virtually annulled by the process of attachment, pending but not matured at the institution of the proceedings in bankruptcy.

The cases cited by the appellant confirmed the conclusion which we should deduce from general principles. In the case *In re Preston*, 6 Nat. B. Register, an attachment was laid on the 20th February, 1871; on the 4th of March there was an order of sale, to prevent loss by delay; on the 18th of March the defendant Preston filed a petition in bankruptcy; on the 20th, sale was made and money deposited. A special case was submitted to the court—the U. S. District Court for Washington Territory. To the question whether the filing of the bankrupt's petition on the 18th of March dissolved the attachment, and rendered null and void the sale and all proceedings thereunder? the court said: "The attachment was dissolved from the date to which the assignment in bankruptcy relates; that is, from the time of the commencement of bankruptcy proceedings. The operation of the assignment in reference to the attachment was not to avoid it, '*ab initio*,' but to arrest all proceedings under it, to dissolve it as of the date of the filing of the petition

in the Supreme Court; to leave untouched all previously accrued rights, to prevent the subsequent accrue ment of rights under the attachment."

The case of *Johnson v. Bishop*, 8 Nat. Bankruptcy Register, 538, as condensed in the syllabus, decides, where property has been attached by an officer of a State court on *mesne* process, within four months prior to the commencement of proceedings in bankruptcy, the attachment is dissolved by the Bankrupt Law; but the assignee in bankruptcy must apply to the State court to have the officer directed to turn over the property, and not to the Federal court. "This rule has been established to avoid conflict of jurisdiction, and through the comity of courts exercising jurisdiction in the same territory, over the same subjects, and often the same classes of litigants, and drawing their existence from different sources, and which are to one another as foreign tribunals." *Corner v. Mallory*, decided by this court, 31 Md. 471, recognizes the same general principles.

There is not in this case any assignee to represent the debtor in the attachment suit, or to claim the property attached, or its proceeds by virtue of the assignment. But the same reason which compels the State courts to recognize the authority of the courts in bankruptcy, in cases of assignment, that is, the exclusive jurisdiction of those courts in matters of bankruptcy—must compel the State tribunals to respect the composition of creditors adopted under the sanction of the courts of bankruptcy, in conformity with the provisions of the Bankrupt Law. The debt of the attaching creditor is extinguished by the composition and the attachment of course falls to the ground.

Judgment affirmed.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE.

BATCHELDER V. PUTNAM.

(54 N. H. 84.)

Attachment — sale of attached property — bankruptcy of defendant.

Personal property was attached, receipted for, restored to the defendant and sold by him to an innocent purchaser. The defendant became bankrupt more than four months afterward, but before judgment. *Held*, that the attachment was not dissolved and that the plaintiff might have a special judgment *in rem* and levy his execution on the money collected of the receptor.

ACTION of attachment by Caleb Batchelder against Jacob Putnam.

After the attachment of the property the defendant was declared a bankrupt, and his counsel withdrew his appearance on that ground. The plaintiff moved for judgment *in rem*. Property of the defendant was attached more than four months before the commencement of proceedings in bankruptcy. Tripp receipted for the property and allowed it to go into the possession of the defendant, who afterward sold it. Upon this state of facts Tripp contended that the attachment was dissolved and the lien lost, and that judgment could not be rendered *in rem*. The presiding judge ruled that the plaintiff was entitled to judgment *in rem*, but reserved the question for the determination of the whole court.

A. W. Sawyer and *C. H. Burns*, for plaintiff, cited, upon the point that the attachment, though dissolved as between the officer and the purchaser, remains good as to the receptor, *Poole v. Symonds*, 1 N. H. 289; *Odiorne v. Colley*, 2 id. 66; *Sinclair v. Tarbox*, id. 185; *Whit*

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ney v. Farwell, 10 id. 9; *Young v. Walker*, 12 id. 502; *Carpenter v. Cummings*, 40 id. 158; *Cross v. Brown*, 41 id. 283; *Waitt v. Thompson*, 43 id. 161; *Treadwell v. Brown*, id. 290; *Sanderson v. Edwards*, 16 Pick. 144; *Bridge v. Wyman*, 14 Mass. 190; *Denny v. Willard*, 11 Pick. 519; *Fettyplace v. Dutch*, 13 id. 388; *Whipple v. Thayer*, 16 id. 25; *Cooper v. Mowry*, 16 Mass. 5;—and, upon the point that the lien being preserved, judgment ought to be rendered against the property attached, *Kittredge v. Warren*, 14 N. H. 509; *Zollar v. Janvrin*, 49 id. 114; *Peck v. Jenness*, 7 How. 612; *Bowman v. Harding*, 56 Me. 559; *Leighton v. Kelsey*, 57 id. 85; *Perry v. Somerby*, id. 552; *Stoddard v. Locke*, 43 Vt. 574; *Bates v. Tappan*, 99 Mass. 376; *Morrison v. Blodgett*, 8 N. H. 238; *Bruce v. Pettengill*, 12 id. 341; *Webb v. Steele*, 13 id. 230; *Drown v. Smith*, 3 id. 299; *Smith v. Brown*, 14 id. 67; *Towle v. Robinson*, 15 id. 408; *Perley v. Brown*, 18 id. 404; *Lamprey v. Leavitt*, 20 id. 544; *Cooper v. Newman*, 45 id. 339; *Ives v. Sturges*, 12 Metc. 462; *Parker v. Muggridge*, 2 Story, 334; *Fettyplace v. Dutch*, 13 Pick. 388; *Parks v. Sheldon*, 36 Conn. 466; *Daggett v. Cook*, 37 id. 341; *Bump on Bankruptcy* (6th ed.), 368.

Stevens & Parker, for defendant's assignees, cited, upon the point that the attachment is dissolved, *Baker v. Warren*, 6 Gray, 527; *Colwell v. Richards*, 9 id. 374; *Dunklee v. Fales*, 5 N. H. 527; *Whitney v. Farwell*, 10 id. 9; *Bagley v. White*, 4 Pick. 395; *Pillsbury v. Small*, 19 Me. 439; *Gower v. Stevens*, id. 92; *Woodman v. Trafton*, 7 id. 178; *Bicknell v. Hill*, 33 id. 298; *Stanley v. Drinkwater*, 43 id. 468; *Waterhouse v. Bird*, 37 id. 326; *Weston v. Dorr*, 25 id. 176; *Denny v. Willard*, 11 Pick. 519; *Robinson v. Mansfield*, 13 id. 139; *Kittredge v. Warren*, 14 N. H. 509; *Knap v. Sprague*, 9 Mass. 258; *Sanderson v. Edwards*, 16 Pick. 144; *Carrington v. Smith*, 8 id. 419; *Carpenter v. Cummings*, 40 N. H. 158; *Bryant v. Warren*, 51 id. 213; *Clark v. Morse*, 10 id. 236; *Drake on Att.*, §§ 350, 360, 423;—and, upon the point that if the attachment is dissolved the lien is not preserved by the receipt, *Bouv. Law. Dict.*, "Lien;" *Colby v. Cressy*, 5 N. H. 237; *Stoddard Woolen Manufactory v. Hunley*, 8 id. 441; *Walcott v. Keith*, 22 id. 196; *Dutton v. N. E. M. F. Ins. Co.*, 29 id. 153; *Pierce v. Emery*, 32 id. 520; *Bryant v. Warren*, 51 id. 213; *Carpenter v. Turrell*, 100 Mass. 450; *Drake on Att.*, §§ 423, 433.

HIBBARD, J. Personal property was attached upon the plaintiff's writ. The defendant procured a receiptor, and the property went again

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into his hands. The officer was not only justified in delivering it to a responsible receptor, but he was bound to accept one if offered. The defendant having been adjudged a bankrupt, the plaintiff is not entitled to judgment *in personam*. But, the proceedings in bankruptcy having been commenced more than four months after the attachment, he is entitled to judgment *in rem* for the amount of his claim, unless here is an exception to the uniform practice in similar cases. The only reason assigned for making an exception against this plaintiff is, that the property attached, received for, and returned to the defendant, has been sold by him. It may be assumed that the purchaser took the property without any such notice of the attachment as to preclude him from holding it. The attachment is, therefore, dissolved, so far as the interests of the purchaser may be affected by it. The officer can no longer levy on the identical property attached; but if the defendant were not in bankruptcy, the security of the plaintiff would be good for its value in the hands of the receptor, who would be estopped from setting up, as a defense to his liability upon the receipt, a dissolution of the attachment occasioned by his own neglect to keep the property according to his engagement. No difficulty would arise, though the attachment on the property were dissolved as between the officer and the purchaser, in levying on its value when collected of the receptor. The doctrine that, because property attached has been sold by the debtor and the attachment dissolved, therefore the receptor has ceased to be liable, is suggested only upon the ground that this result is affected by the bankruptcy of the defendant. But how can that circumstance affect the question?

In *Towle v. Robinson*, 15 N. H. 409, and in *Lamprey v. Leavitt*, 20 id. 544, it was expressly decided that the receptor remains liable in such a case. It is claimed by counsel that these are not authorities in the present case, because the judgments in those cases do not appear to have been *in rem*; but they must have been, unless judgments were negligently allowed to be taken *in personam*. In the case last cited, it is stated in the head-note that execution was "awarded against the property attached," from which it appears that the judgment was *in rem*.

If the property attached in the present case had been retained in the hands of the officer, the security of the plaintiff would be wholly unaffected by the bankruptcy proceedings. *Kittredge v. Warren*, 14 N. H. 509. And it certainly would be extraordinary if his security, being fully preserved until the bankruptcy proceedings by the delivery of the property to a receptor according to law, should be suddenly lost the moment those proceedings are commenced, though more than four months after the attachment. We perceive no difficulty in rendering

judgment *in rem*, and levying the execution issued upon the money which may be collected of the receiptor. If the receipt is in common form, and the officer lawfully demands the property, the receiptor must deliver it to him free from intervening rights, or become liable. If the property has been sold, it could not avail the receiptor to exhibit it to the officer, subject to a title in a third person acquired since the receipt was given. It must, when delivered, be subject to a levy in the same manner as when he received it, or the receiptor will not be exonerated. We do not see that this is any thing but the ordinary case of an attachment lost by the property, after it is receipted for, being sold or used up by the debtor. It would appear that the precise contingency that the receipt was taken to secure against has happened. In other words, the property attached has gone where it is beyond the power of the officer to levy upon it. What could be the object of taking a receipt for property attached, unless it was to be good if the property should be sold or used up before judgment? Whether in the mean time the defendant has or has not become a bankrupt, unless the bankruptcy were in season to vacate the attachment, must be wholly immaterial.

In *Carpenter v. Terrell*, 100 Mass. 450, where an attachment was dissolved by the giving of a bond to pay the judgment which should be recovered, it was held, that the plaintiffs were not entitled to have a special judgment entered to enable them to avail themselves of the bond. But that decision was based on the peculiar terms of the bond, and it may be inferred from the opinion of the court that a contrary result would have been reached if the property attached had gone into the hands of a receiptor. Undoubtedly this would have been so, because it was expressly held, in an earlier decision of the same court, which has never been overruled or questioned, in an action in favor of a deputy-sheriff against a receiptor of property attached, that when necessary a plaintiff in such a case may have a special judgment and execution to enable him to avail himself of his attachment. *Ives v. Sturgis*, 12 Metc, 462.

We are of the opinion that in this State, where a creditor of a bankrupt has acquired a vested right in his security by the lapse of time after an attachment, he is entitled to a special judgment against the property, or the avails of it, or its substitute or equivalent, whether the identical property remains in the hands of the officer, or it has been sold by consent, under section 19, chapter 205, General Statutes; or upon the certificate of examiners, under section 22; or restored to the debtor upon his giving bond, under section 25; or taken from the officer by a writ of replevin, under section 26; or given up upon a bond in review, under the 48th rule of court. See *Zoeter v. Janvrin*, 49 N. H. 114.

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The plaintiff must, therefore, be permitted to take judgment *in rem* for such sum as he might lawfully recover against the defendant, if there were no bankruptcy proceedings.

Case discharged.

HOIT V. THE STRATTON MILLS.

(54 N. H. 109.)

Sale of standing timber — license to enter and remove.

The owner of land conveyed the timber standing and lying thereon, with license to the grantee to enter and remove the same. *Held*, that the grantee might enter within a reasonable time, but that if he did so afterward he was liable in trespass *quare clausum* for the entry, but not for the value of the trees.

ACTION of trespass *quare clausum* and *de bonis*.

Plea, the general issue, and brief statement of license. In 1863, one Rebecca Very, who then owned the land, conveyed the timber standing, lying, and being thereon, to one Kingsley, by deed (duly executed, acknowledged, and recorded), containing an agreement that Very would deliver the timber at a certain place not on the land, on or before April 1 1866, and that, if Very failed so to deliver it, the grantee, his heirs and assigns, might enter the premises and take the timber. Very received payment for the timber, but did not deliver it. In 1866, Kingsley conveyed the timber to Hardy, and in 1868, Hardy conveyed it to the defendants. In 1870, Very conveyed the land to the plaintiff. In 1871, the defendants cut some of the timber and carried it away.

The jury disagreed, and questions were reserved.

Cushing and Albee, for plaintiff.

Wheeler & Faulkner, for defendants.

DOE, J. Very, the former owner of the land, having failed to deliver the timber April 1, 1866 (the time agreed upon), Kingsley, his heirs and assigns, had a reasonable time after that date in which to take it. This reasonable time is given, not by the express terms of the deed, but by construction—that is, by an inference of the intention and understanding of the parties. It would be unreasonable to infer that the parties understood that Kingsley, his heirs and assigns, would have a right to leave the timber incumbering the land forever, or to enter and remove

it whenever they pleased at any time or times in the distant future. The reasonable inference is, that the parties understood and agreed that the timber not delivered by Very on or before the 1st day of April, 1866, might rightfully remain on the land a reasonable time after that date, and that Kingsley, his heirs and assigns, might rightfully enter within that reasonable time to remove it. The length of the reasonable time is a question of fact for the jury. If the defendants entered after the expiration of the reasonable time, they are liable for the entry.

Are the defendants liable for the value of timber removed by them after the expiration of the reasonable time, as well as for the entry? This question is not answered by the express terms of the deed, but, like the question whether Kingsley, his heirs and assigns, had a reasonable time after April 1, 1866, for removing the timber, it must be answered by a fair and reasonable construction. The defendants are not liable for the timber removed by them after the reasonable time, if it was their property; they are liable for it if it belonged to the plaintiff. Would timber, removed by the defendants after the expiration of the reasonable time—after their right to enter had ceased—be theirs, or the plaintiff's? Did the deed from Very to Kingsley convey the timber absolutely, or upon condition that it be removed before the expiration of the reasonable time? The deed, in terms, says nothing about a reasonable time, and nothing about a condition of removal within a reasonable time. But the deed means that Kingsley, his heirs and assigns, could rightfully keep the timber on the land no longer than a reasonable time after April 1, 1866, and could rightfully enter to remove it only within such reasonable time. And, this being the meaning and legal construction of the deed, the case is as if a stipulation for the removal of the timber within such reasonable time had been inserted in the deed. Suppose the deed had contained this additional provision: "Said Kingsley, his heirs and assigns, are to have a reasonable time after April 1, 1866, to take the timber off in." If the defendants cut the timber within, and removed it after, the reasonable time, they would not be liable for its value. *Plumer v. Prescott*, 43 N. H. 277. An unconditional conveyance of growing trees without the land, instantaneously severs them from the land, in contemplation of law, and transforms them into personal property. *Kingsley v. Holbrook*, 45 N. H. 313.

If the deed from Very to Kingsley conveyed the trees, they became the personal property of the grantee, rightfully on the grantor's land until the expiration of the reasonable time, and wrongfully there after that time. The value of the grantee's property would not be a part of the damage done by him in wrongfully entering to remove it after that

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time; but the injury done to the land-owner by the timber-owner's fault in allowing his property to wrongfully remain on the land, would be a damage for which the land-owner could maintain an action. *Dame v. Dame*, 38 N. H. 429, 432, 433; *Harris v. Gillingham*, 6 id. 9, 11; *Domat Civil Law*, B. 2, T. 9. S. 1, § 8. The deed does not contain an express stipulation either that the grantee may or that he shall remove the trees within the reasonable time; but his obligation to remove them within that time is as plainly shown by his making the purchase and accepting the deed, as the grantor's obligation to allow the reasonable time by his making the sale and executing the deed. In the absence of a literal agreement, the mutual understanding of the parties on both points is necessarily implied from the fact of the sale.

If the deed conveyed the trees on condition that they be removed within the reasonable time, or conveyed such trees only as should be removed within that time, then the trees not removed within that time did not pass by the deed, but remained the property of the land-owner, and their value would be a part of the amount of damage done to the plaintiff by the defendants' entering and removing them.

The deed purported to convey the timber trees "standing, lying, and being" on the land, with an express agreement that the grantor would deliver them off the land on or before April 1, 1866, and with an implied agreement that the grantee might and should remove, within a reasonable time after that date, such as the grantor did not deliver according to his promise. If any of the trees were "lying" on the land when the deed was delivered, they passed by the deed when the deed was delivered, as any other personal chattels would pass. Did the trees then "standing" pass at the same time? The deed does not expressly make any distinction between those "lying" and those "standing." In terms, it conveys those "standing" and those "lying" equally without condition. Does a fair construction of the deed make a distinction between them? If there is an implied condition applicable to those "standing," and not applicable to those "lying," it is, not that the former shall be removed from the land within the reasonable time, but merely that they shall be cut down within that time (*Plumer v. Prescott*); and as the deed, construed to be absolute, and unconditional (as it is if taken literally), would be a constructive severance of the "standing" trees, and a transformation of them into personal property (*Kingsley v. Holbrook*), what reason is there to infer, in the absence of an express stipulation on the subject, that the parties intended the "standing" trees should not pass by the deed unless they were cut within the reasonable time? Since a conveyance of standing trees operates as a conveyance

of real estate and a severance of it, or as a severance and a conveyance of personal property ; and since the parties did not agree that the trees "lying" on the land when the deed was made, and those cut within the reasonable time, should remain the property of the grantor unless they were removed within the reasonable time, what rule of construction is there upon which it can be held that the parties intended that those "standing" when the deed was made, should remain the property of the grantor unless they were cut within the reasonable time? When the removal of personal chattels from the vendor's premises within a reasonable time is not necessary to the passing of the title of the chattels to the vendee ; when standing trees are more easily changed from real to personal property by a paper instrument than by an iron one ; and when the mere cutting down such trees is not a liberation of the land from their incumbrance, how can this deed (unconditional in its terms, as to vesting in the grantee the ownership of the trees "standing, lying, and being" on the land) be construed to retain in the grantor the ownership of the "standing" trees not cut within the reasonable time? Why should "standing" trees be exempted from the operation of the general rules of law.

Pease & ano. v. Gibson, 6 Greenl. 81, was trespass *quare clausum*. Dec. 7, 1819, one O., who then owned the land, agreed, in writing under seal, to let H. "have all the pine trees fit for mill logs on" a certain lot of land, said H. "to have two years from date to take off said timber." After the lapse of two years, H. assigned his right to W., "under whom the defendant justified as his servant," upon the pleas of the general issue and license. At the trial, the judge ruled there was no defense ; and the ruling was sustained on the ground that under the general issue the defendant offered no proof of title to the *locus in quo*, and under the plea of license, the only license proved was one that had expired by its own limitation on Dec. 7, 1821, several years before the entry complained of. The defendant did not claim that, if he was liable for the entry, he was not liable for the value of the trees which he carried away. The question of the measure of damages was not raised. If the plaintiffs owned and had possession of the land, and the original license had expired, and no new one was given, the decision that, in trespass *quare clausum*, upon the pleas of the general issue and license, the plaintiffs were entitled to a verdict, was evidently correct. But such a decision is no authority on the question whether the value of the trees should be included in the damages. The court, MELLETT, C. J., and PARRIS, J. (WESTON, J., being absent), added the following observations : "But if we were at liberty to consider a sale of the timber as proof of the license pleaded,

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still our opinion would be that it was only a conditional sale — that is, a sale of the timber that H. or his assignee should cut and carry away within the two years mentioned in the license. To admit the construction given by the defendant's counsel, and consider such a permission as a sale of trees, to be cut and carried away at the good pleasure of the purchaser, and without any reference to the limitation, in point of time, specified in the permit, would be highly injurious in its consequences. It would deprive the owner of the land of the privilege of cultivating it and rendering it productive, thus occasioning public inconvenience and injury, and in fact it would amount to an indefinite permission. The purchaser, on this principle, might, by gradually cutting the trees and clearing them away, make room for a succeeding growth; and before he would have removed the trees standing on the land at the time of receiving such a license or sale, others would grow to a sufficient size to be useful and valuable, and thus the owner of the land would be completely deprived of all use of it. Principles leading to such consequences as we have mentioned cannot receive the sanction of this court."

If the time for removing trees or other things from the vendor's land is expressly fixed in the contract of sale, the purchaser is a trespasser in entering after that time to remove them. If no time is expressly fixed, a reasonable time is ordinarily to be taken, by implication and construction, as the time intended by the parties; and the purchaser is a trespasser in entering after the reasonable time. In either case, being a trespasser, he is liable for the damage done to the land-owner by his trespass. But whether he is liable to the land-owner for the value of what he carries away as well as for his wrongful entry, depends upon the question whether what he carries away is his property or the property of the land-owner. The reason given, in *Pease & ano. v. Gibson*, for holding that the trees were the property of the land-owner, was the inconvenience and injury which the land-owner would suffer from the purchaser's keeping his trees on the land as long as he pleased. Was that a sufficient reason?

The defendant (in interest) in that case claimed that the sale of the trees was absolute, and that a new license to enter had been given after the expiration of the two years. The court held (on some ground not very distinctly reported) that there was no evidence of a second license. The defendant did not contend that he had a right to keep his trees on the plaintiff's land as long as he pleased, or to keep them there at all without the plaintiff's consent. But the court seem to have inadvertently taken it for granted that the defendant could not own the trees after the time fixed for their removal, unless he had a right to keep them

on the land as long as he pleased ; that the trees could not be the property of the defendant, because, if they were not the property of the plaintiffs, they were wrongfully on their land ; and that the defendant's claim involved the absurdity of a land-owner's selling trees with an agreement that they might remain on his land forever without his consent. The question, whether certain property on the plaintiff's land belongs to the plaintiff or the defendant, is not to be confounded with the question whether, if it belongs to the defendant, it is wrongfully on the plaintiff's land. The title of property does not necessarily depend in all cases on its locality, or on its being rightfully or wrongfully where it is.

When A agrees to sell property that is on his land (in his shop, store, house, or barn, or out-doors), and B agrees to buy it ; and enough is done to pass the title, except coming to a mutual understanding that the title passes ; and the only doubt as to the existence of such an understanding arises from a stipulation that B shall remove the property within a certain or a reasonable time, this stipulation is not necessarily, in all cases, a condition attached to the passing of the title. In some cases of parol contract for the sale of personal property, with a stipulation as to time of removal, it might be a question of fact for the jury whether the parties understood that the title should not pass, or should revert, unless the property was removed within the time agreed upon. There might be circumstances tending to show such an understanding ; both parties might testify what their understanding was on that point when the bargain was made. And in a written contract, construed by the court, containing no express stipulation that the passing of the title should depend upon the removal of the property within the time fixed, a condition to that effect might be inferred from various provisions indirectly showing the intent of the parties. But there is no absolute rule of law requiring such a condition to be inferred in all cases from a stipulation (express or implied) about the time of removal. When the property is where the vendee has no right to keep it, there is generally a stipulation (express or implied) that he shall remove it within a certain time or a reasonable time ; but it does not necessarily follow as a matter of law (and, as a matter of fact, the parties do not generally understand), that the title is affected and the sale defeated by the non-performance of that stipulation. Such a stipulation may be independent of the title ; and it may be a condition annexed to it. Whether it is the former or the latter, is a question to be settled by a fair construction of the whole instrument. When (as in the present case) the terms of grant in a deed literally signify an absolute conveyance of "standing" trees, and there is no conditional or explanatory provision other than a stipulation (ex

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press or implied) for removal within a certain or a reasonable time, does a fair construction of the whole make that stipulation a condition that defeats the grantee's title to "standing" trees, while it is an independent provision that does not affect the title of trees "lying" on the ground?

No distinction was made, in *Pease & ano. v. Gibson*, and no principle was there laid down on which a distinction can be made, between trees and other personal property, or between trees "lying," and trees "standing." And as a conveyance of standing trees is, in law, a severance, and a conversion of them into personal property at the time of the delivery of the deed (*Kingsley v. Holbrook*); and as a stipulation (express or implied) fixing the time of removal is not, of itself, a modification of the literal terms of an absolute grant of standing trees afterward cut within the time of removal; and a mere non-compliance with such a stipulation does not defeat the title to such trees (*Plumer v. Prescott*), it is impossible to construe such a stipulation as a modification of the literal terms of an absolute grant of standing trees afterward cut after the time of removal. If such a stipulation is not a condition that the title is not to pass unless the trees are removed within the stipulated time, it cannot be a condition that the title is not to pass unless they are cut within that time. If an agreement as to time of removal does not make the title depend upon removal, it does not make the title depend upon cutting.

The injury which the land-owner suffers from the trees not being removed within the time fixed, if it is the reason of a rule of construction, would apply to trees cut during that time, and to trees lying on the ground when the deed was delivered, as well as to trees cut after the expiration of the time fixed. It might also apply to buildings and other chattels of great weight, bulk, number, or quantity; and, under some circumstances, to a single animal, or some small article, combustible, explosive, or otherwise dangerous, noxious, injurious, or troublesome. Injury may result to any person from the wrongful occupation of any part of his premises by any property of another. The injuries that may be thus caused are infinite in variety, and of an infinite number of degrees in amount. The most trifling one of them is not sufficient in law to turn a written agreement about the time of removal into a condition defeating the title; and no method has been discovered of dividing them into two classes, one of which can furnish the legal construction of a deed, while the other cannot. When each of two deeds contains the literal terms of an absolute grant of property on the grantor's land, and a stipulation (express or implied) as to the time of removal, the court cannot hold the stipulation to be a condition affecting the title and de-

feating the grant in one case, on the sole ground that the court infer that, as a matter of fact, non-removal would be injurious in a high degree to the grantor, and hold the grant in the other deed to be absolute on the sole ground that the court infer that, as a matter of fact, non-removal would inflict only a slight injury. If a deed contains the literal terms of an absolute grant of a forest and an axe on the grantor's land, and a stipulation (express or implied) that the property is to be removed by the grantee in a reasonable time, and none of it is removed in that time, the court cannot hold that, as matter of law, the forest belongs to the grantor and the axe to the grantee.

In *Pease & ano. v. Gibson*, the court suggest that one injurious consequence of holding the trees (not removed within the time fixed) to be the property of the grantee, would be that the grantee could take "a succeeding growth." But if the question of succeeding growth had arisen, the plaintiff would probably have claimed that the conveyance was of such pine trees only as were "fit for mill logs" at the time of the conveyance, and not of such as might, by subsequent growth, become fit during the two years, the stipulated time of removal. The defendant certainly could not have claimed that the conveyance was of such as should ever become fit after that time.

Growing trees, like a herd of cattle or a horse, not only occupy and incumber the land; they take "from it the means of growth and support." *Plumer v. Prescott*, 43 N. H. 277, 278. For the wrongful abstraction of nutriment from the plaintiff's land, by members of the vegetable or animal kingdoms belonging to the defendant, as well as for the wrongful occupation of the land, the defendant would be liable in some form of action. The wrongful conversion of the plaintiff's property to the defendant's use, by vegetable or animal process, is one of the numerous injuries which a plaintiff may suffer from property wrongfully on his premises. But an injury of that kind may be less than others occasioned by wrongful occupation without any such conversion; and it cannot establish a rule of law for giving to the literal terms of an absolute grant a construction that leaves the title in the grantor.

When the time for the defendant's keeping his trees or other chattels on the plaintiff's land has expired, the defendant cannot keep them there as long as he pleases. He cannot rightfully keep them there after that time. He can wrongfully leave them there after that time, as he can wrongfully do, or wrongfully neglect to do, a great variety of other things. He is liable, as for any tort or breach of contract, to the extent of the legal rule of damages, for injuries caused by his wrongful omission to remove them within the time expressly or impliedly *§ 244*

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Not only has the plaintiff a remedy by legal process for the injuries which he suffers from the defendant's property being on his land after the time of removal; he also has the "natural, essential, and inherent" right of "protecting property." He can, without legal process, protect his property against the wrongful presence and injurious action and effect of the defendant's property. And this right is the right to do whatever, under the circumstances of each case, apparently is reasonably necessary to be done in defense. *Aldrich v. Wright*, 53 N. H. 398. In that case, some authorities are cited showing that it may be reasonably necessary, in the defense of one's own property, to destroy the property of another. If in defense it is reasonably necessary for A to remove B's property from A's land, he may remove it. If it is reasonably necessary for him to destroy it, he may destroy it. If it is reasonably necessary for him to sell it, he may sell it. If it is reasonably necessary for him, in defense, to do any thing after reasonable notice. If it is reasonably necessary for him to have a lien on the offending property or its proceeds for the expenses of the exercise of his natural right of defense, he has a lien. When B is liable for the damage caused to A by his property wrongfully remaining on A's land, he must also be liable for the reasonable expense to which his fault puts A in ridding his land of the incumbrance. And if indemnity by lien is a part of the reasonable necessity of A's defense, it is a part of his natural right of defense. His remedy by the exercise of his natural right of defense is as broad as the reasonable necessity of the case. That right is a plenary one, whether the thing against which it may be exercised is wrongfully allowed to remain, or is wrongfully put on his land, by B. He may resist a wrongful occupation of his land, as well as a wrongful invasion of it. A wrongful occupation is a wrongful invasion of his right of property.

There is no peculiar hardship in this case that can be the foundation of an exception to the general rules of law, or make that a conditional conveyance of trees which would be an absolute conveyance of other property. The deed is absolute; the title passed to the grantee; and the defendants are not liable for the value of their own property removed after the expiration of the reasonable time.

Case discharged.

WOOSTER v. PAGE.

(54 N. H. 125.)

Attachment — of insurance money in hands of insurer.

An insurance company is liable as garnishee or trustee of the insured after a loss, though the property insured was exempt from attachment.

FOREIGN attachment. The case was transferred to this court by agreement.

The question is, for what sum the trustee shall be charged. The trustee is indebted to the defendant in the sum of five hundred dollars. Two hundred of this five hundred dollars was for loss on household furniture, which would have been at the time of the loss by fire exempted from attachment. The question now is, Is the two hundred dollars liable to attachment in the hands of said insurance company, or is it exempt?

Murray, for plaintiff. "The statutory exemptions of property in favor of debtors are uniformly limited to specific chattels, and do not extend to debts or pecuniary claims due to the debtor," except for labor of the defendant to the amount of twenty dollars, and pension and bounty money. See Gen. Stats., ch. 205, § 2, as amended by act of July 15, 1871; *Edson v. Trask*, 22 Vt. 18; *Clark v. Averill*, 31 id. 512; *Cook v. Holbrook*, 6 Allen, 572; *Kellogg v. Waite*, 12 id. 529; *Maxwell v. McGee*, 12 Cush. 137; *Manchester v. Burns*, 45 N. H. 488, and cases there cited.

J. D. Weeks, for principal defendant. I. The provisions of Gen. Stats., ch. 205, § 2, as amended by the act of July 15, 1871, were intended for a shield and protection to the poor man; hence the exemption from trustee process of the labor of the defendant to the amount of twenty dollars, and pension and bounty money.

II. The inquiry here seems to be, whether the decision of the court in *Manchester v. Burns*, 45 N. H. 488, and the remarks of the court in *Paul v. Reed*, 52 id. 136, are pertinent to the questions submitted in this case. *Parks v. Hadley*, 9 Vt. 320; *Adams v. Newell*, 8 id. 190; *Hitchcock v. Egerton*, id. 202.

III. In *Brown v. Heath*, 45 N. H. 168, it was held, that the town of Clarksville was not chargeable, as trustee of Heath, on account of certain bounty which the town had offered to induce volunteers to enlist.

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That decision was founded upon public policy, it is said. So we deem it in accordance with public policy that the debtor, after having protected his property, which by our statute is exempt from attachment (by insurance), should receive the insurance on the same in case of loss by fire, as the reverse of the rule would but make the poor poorer.

IV. In *Cook v. Holbrook*, 6 Allen, 572, supported by *Maxwell v. McGee*, 12 Cush. 137, the question mainly raised is as to the money being attachable by trustee process in the hands of a third person, which is not applicable to this case. The insurance company is the party owing the money, which has not passed as yet to any one. Besides, there is no waiver on the part of the defendant of the exemption, and no change of property by any act of his. *Rice v. Chase*, 9 N. H. 180.

V. The insurance company is not liable in a trustee process as the trustee of the creditor on account of the contingency of a demand of this nature, which is only payable upon the showing of certain and proper proofs. *Pollard v. Ross*, 5 Mass. 319; *Barnes v. Treat*, 7 id. 271; *Wakefield v. Martin*, 3 id. 558.

FOSTER, J. The question raised by this case is very simple, and easily disposed of.

The statutory exemptions of property from attachment are uniformly limited to specific chattels. Gen. Stats., ch. 205, § 2; Laws of 1871, ch. 30.

The only exceptions that occur to us are the exemptions from attachment by the trustee process of pension and bounty money, and the wages of the debtor and his family in certain cases. Gen. Stats., ch. 280, §§ 47, 48.

Until the revision of 1867, the laws did not specifically exempt bounty money; but prior to that time, in the case of *Brown v. Heath*, 45 N. H. 168, it was decided that the bounty to which a volunteer was entitled, while still in the hands of the town, could not be attached upon the trustee process; and such was the opinion of the justices of this court, furnished the governor of the State in 1862.

This exemption was placed solely on the ground of public policy, and was prompted by the exigencies of the war, which required the offer of bounties as an encouragement to enlistments.

In a subsequent case it was held, that the exemption was restricted to the money still in the hands of the town from which the bounty was due, and that it did not extend to the fund after it had come into the hands of the debtor; concerning which it was said that the policy of the law is sustained if the fund is protected until it reaches the hands of

the volunteer. "When it does, it is practically in his power to apply it for the support of his family in obtaining a homestead, purchasing provisions or other necessities from time to time, which are exempt from attachment; or, on the other hand, to apply it directly to the payment of his debts, or to the purchase of property liable to be taken for them." *Morse v. Towns*, 45 N. H. 185. To the same effect is *Manchester v. Burns*, id. 482. The opinion in the latter case and the authorities there collected are decisive of the present.

When the debtor's household furniture was consumed, the property exempt from attachment was gone. It was doubtless a great misfortune, but it was one of those misfortunes for the relief of which the legislature has made no provision. It is the furniture, and not the avails of it in another form, which is protected. When the property is consumed, it is no longer household furniture in the possession of the debtor, nor did it become household furniture of the debtor in the hands of the insurance company. The supposed trustees had no specific chattels of the defendant in their hands, nor were they his debtors for any wages due him or his family for personal labor. What is in the hands of the insurance company belonging to the defendant is money, having no earmark by which it may be distinguished from any other money, and not derived by any process of transmutation from the ashes of the defendant's goods; and hence the exemption which before existed by statute cannot follow and appertain to this indebtedness of the insurance company.

In *Morse v. Towns*, before cited (the hardship of which would seem to have been quite as onerous as is that of the present case), it appeared from the disclosure of the trustee that Towns, having enlisted and received from the town of Pembroke a bounty of two hundred dollars, went away to the wars leaving the money with his wife for the support of herself and their two children. The wife used a part of it, and of the rest put into the hands of the trustee one hundred and fifty dollars, to be returned from time to time as needed for the support of the family; and for this sum the trustee gave her his note, payable to her or her order. The trustee stated that he took the money expressly as the bounty money of the husband, and that the wife had no other means of support. The trustee was held chargeable, on the ground that the bounty having been paid over to the volunteer was no longer *bounty*, and as such exempt, but was simply *money* not exempt.

The cases cited by the plaintiff's counsel fully sustain his position. Most of them are reviewed in the opinion in *Manchester v. Burns*. And the recent case of *Pau' v. Reed*, 52 N. H. 136, is in harmony with the argument upon which this opinion is based.

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The agreed case states that the insurance company "is indebted to the defendant in the sum of five hundred dollars."

We therefore assume that the proper proofs of loss and whatever else may have been required on the part of the insured have been furnished, and that there is no contingency or uncertainty pertaining to the demand of the defendant upon the insurance company.

Trustee chargeable.

ROCKPORT V. WALDEN.

(54 N. H. 167.)

Statute of limitation — vested right under.

When the statute of limitation has run on a debt, the debtor's right to the defense is vested and any statute which afterward annuls or takes it away is unconstitutional.

BILL in equity by the town of Rockport against Walden, executor of one Kussell. The opinion states the case.

Hatch, for defendant.

W. H. Hackett, for plaintiff.

SARGENT, C. J. This bill is brought under the provisions of chapter 7, Laws of 1872, sections 2 and 3, which are as follows :

2. "Whenever any one has a claim against the estate of a deceased person, which has not been prosecuted within the time limited by law, he may apply to the Supreme Judicial Court by bill in equity setting forth all the facts; and if the court shall be of the opinion that justice and equity require it, and that said claimant is not chargeable with culpable neglect in not bringing his suit within the time limited by law, they may give him judgment for the amount of his claim against the estate of the deceased person; but such judgment shall not affect any payments or compromises made before the commencement of such bill in equity."

3. "The provisions of this act shall apply to all claims, whether the time for prosecuting the same had or had not expired at the time of the passage of said act."

This act was approved July 4, 1872.

The following facts appeared or were found by the court: The plaintiffs recovered a judgment against the testator prior to March 20, 1849,

so that execution issued on said day ; a demand upon the same was made upon the testator in his life-time, but not paid, and the execution was presented to the defendant as executor, and payment demanded of him immediately after his appointment as executor, who did not pay. Said Russell died October 27, 1866, and the defendant was appointed executor, March 17, 1868. A deed of certain real estate in Portsmouth was given to the testator, and recorded April 19, 1856. This land he held from that time to the time of his death, a period of $10\frac{1}{2}$ years, openly and without any incumbrance, and he devised it in and by his last will; and the court find that he concealed nothing; and though the court find that the plaintiffs were informed and believed that the land thus appearing on the record as his was not in fact his, but belonged to somebody else, yet it does not appear that the testator ever made any such representations to the plaintiffs or anybody else; and we infer that he did not do so, by the finding that the said property was not concealed.

This bill was filed January 4, 1873, and the court, among other things, held that the provisions of chapter 7, section 2, of the Laws of 1872, were applicable to this case, and that the plaintiffs were not chargeable with culpable neglect in not bringing this suit within the time limited by law.

Without stopping to inquire whether the finding of the court upon the facts is now open for discussion, and without inquiring whether the finding is sufficient without finding all the facts required by the act (section 2), let us examine this proposition and see whether chapter 7, sections 2 and 3, of the Laws of 1872, are applicable to this case. They are in terms no doubt, for the law seems to have been made expressly to meet this identical case.

But can the case be met in that way? The admitted facts in the case are, that this defendant was appointed executor of the will of the deceased testator, March 17, 1868, and this bill was not brought till January 4, 1873, lacking less than three months of five years from the time of the granting of administration.

Chapter 179, section 5, of General Statutes, provides that "no suit shall be maintained against any administrator for any cause of action against the deceased, unless the same is commenced within three years next after the original grant of administration," with certain exceptions which do not arise in this case. Now this term of three years, within which any suit by these plaintiffs against this defendant must be brought, and after the expiration of which no suit could be maintained against the administrator, had expired not only long before this suit was brought, but long before the law was passed which authorized this suit to be

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brought. The law was passed July 4, 1872; the three years from the time of the original grant of administration expired March 17, 1871; so that before this law was passed the plaintiff's right of action was completely and forever barred. The defendant had this legal and perfect defense to any action the plaintiffs might ever bring upon this claim.

This right had become vested in the defendant. The administrator in such cases has no right or power to waive this plea, as it has been held that he may the general statute of limitations, when it had run against the claim before the death of the testator. It is very questionable, we think, whether that holding was not incorrect, and whether a wide door for fraud and collusion and the unjust preference of some creditors at the expense of others was not thus opened, which it will be well to close as soon as can be properly done. But in this case the statute creates a bar which none can waive. "No suit shall be maintained against any administrator unless," etc. This statute he cannot waive. He cannot prevent or avoid the effect of this statute, even by a new promise in writing, so as to affect the estate. *Hodgdon v. White*, 11 N. H. 208; *Amoskeag Co. v. Barnes*, 48 id. 25; *Hall v. Woodman*, 49 id. 295, 304.

This right of the defendant to be forever discharged from this claim or any suit upon it had become completely vested before the law was passed. Can a new statute, made after such right had become vested, take away or remove or avoid that right? The twenty-third article of the bill of rights was intended to prohibit the making of any law prescribing new rules for the decision of existing causes, so as to change the ground of the action or the nature of the defense. In *Woart v. Winnick*, 3 N. H. 481, *RICHARDSON, C. J.*, and in *Clark v. Clark*, 10 id. 380, 386, *PARKER, C. J.*, it is settled that a law will be equally retrospective in its operation if it affect an existing cause of action or an existing right of defense, by taking away or abrogating a perfect existing right, although no suit or legal proceeding then exists.

And it is held that, if a right of defense has not become vested by the lapse of the full time required for the limitation of the action, the law may be repealed; for though the right would soon be vested if the law was not repealed, yet that if, when it is repealed, it has not become vested, the repeal would not be unconstitutional; but when such right under the statute of limitations has become vested and perfect, any law which afterward annuls or takes it away is retrospective.

That is precisely this case; and in *Rich v. Flanders*, 39 N. H. 304, it is held that a statute changing the rules of evidence or of practice is ordinarily to be classed with those affecting the remedy, and not unconstitutional unless they destroy vested rights; yet, if a statute which

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in form effects the remedy, or the rules of evidence or of practice only, practically and in fact divests vested rights, it is unconstitutional and void. This is clearly the effect of this statute, so far as it was attempted to make it apply to actions upon claims where the time for prosecuting the same had expired before the time of the passage of said act.

When the right of the defendant had become vested by the lapse of time, it is immaterial whether the plaintiffs were chargeable with culpable neglect or not in suffering it to pass. See, also, on this point, *Merrill v. Shurburn*, 1 N. H. 213; *Roby v. West*, 4 id. 287; *Kennett's Petition*, 24 id. 139; *Willard v. Harvey*, 24 id. 351; *Adams v. Hackett*, 27 id. 294; *Gilman v. Cutts*, 23 id. 382; *Lakeman v. Moore*, 32 id. 413; *Towle v. Eastern Railroad*, 18 id. 547; *Howard v. Hildreth*, id. 107; *Pickering v. Pickering*, 19 id. 389; *Little v. Gibson*, 39 id. 505; *Morgan v. Perry*, 51 id. 559; *Railroad Co. v. Elliot*, 52 id. 387.

Our conclusion is, that chapter 7, section 2, of the Laws of 1872, is not applicable to this case for the reasons above stated, and that this statute is unconstitutional, so far as it was attempted to make it applicable to cases like this where the time of prosecution had expired before the law was passed. The order for a judgment in favor of the plaintiffs must be revoked, and

The bill must be dismissed.

CITIZENS' NATIONAL BANK v. CULVER.

(54 N. H. 327.)

Attorneys' lien — by what law governed — conflict of laws.

The lien of an attorney upon a judgment recovered by him is governed by the law of the State where the judgment was recovered and the lien attached, and not by the law of the State where the judgment is sought to be collected.

ASSUMPSIT by the Citizens' National Bank against Culver as principal, and others as trustees, to recover moneys in the hands of the trustees, belonging to said Culver.

The court found that one Sanborn, of New Hampshire, brought a suit at law upon a note, and a bill in chancery to foreclose a mortgage, against said Culver, in the courts of Vermont, in 1870, both of which suits terminated in favor of said Culver, and in 1872 a final decree was made for Culver, that he recover his costs. The costs were taxed, and judgment rendered in his favor for the same. Execution issued on said judgment in the name of Culver against said Sanborn, and this execution

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was sent by said Paul, Culver's counsel, to Pike & Blodgett, the trustees, who collected the same of said Sanborn, and thereupon this writ was served upon them as trustees. The amount disclosed by the trustees is the sum thus collected. Said Paul claimed these funds on the ground that he had a lien upon the execution for his fees and disbursements in said suits against Culver, in Vermont.

The court found that said Paul, an attorney and counselor at law in Vermont, was said Culver's counsel in the two suits in Vermont, and that his charges for services and disbursements in both said suits were \$220.25; that he had credited Culver with \$33.95, cash paid him by Culver, leaving a balance in his favor of \$186.30. The charges are for the usual travel and attendance at court, and for services in taking depositions and testimony in the chancery case, arguments, etc., and the court found that said charges were reasonable and proper charges for the services rendered.

After said judgment was rendered, said Culver told said Paul to take the judgment and apply it on said Paul's account against him as far as it would go; that said Paul had the judgment entered up, took the execution, and sent it to Pike & Blodgett, with orders to collect the same, — but he did not notify them that he held a lien or any claim of any kind upon it, and he had not in fact ever given Culver credit for the amount of it upon his account, said Paul understanding that the judgment and execution were his to do as he pleased with, but not to be credited or allowed on account till collected. It appeared that said Culver owned a farm in Vermont subject to a heavy incumbrance, but whether he was worth any thing above said incumbrance did not appear. Said Paul claimed to hold his lien according to the laws of Vermont, as found in the judicial decisions. No directions were given said Paul as to how he should make the application of the amount of this judgment, and said Paul has no other funds of said Culver's in his hands to be applied on said account.

The court ruled *pro forma* that the claimant was entitled to hold the funds in the hands of the trustees, and the plaintiff excepted.

The questions of law were reversed.

Barnard, for plaintiff.

Blodgett, for claimant.

SARGENT, C. J. The plaintiff claims that a lawyer's lien must depend upon the laws of the State where it is sought to be enforced, and that it cannot depend upon the law of any other State, unless the law of

that other State has binding force beyond the territorial limits of such State. But that is not the true ground upon which the law of contracts even is held to be, that the law of the place where the contract is made must as a general rule govern its construction. The law of the place where the contract is made has no more force outside the limits of that State or country, than the law regulating attorneys' liens has.

But it is not upon the principle that any of these laws have any force outside the State or country that made them; and their authority is admitted in other States, not *ex proprio vigore*, but *ex comitate* (*Smith v. Godfrey*, 28 N. H. 379); and it may be difficult to see why this principle of *ex comitate* should not apply to the law regulating attorneys' liens, as well as to the other laws governing the construction and interpretation of contracts.

It is admitted that if this matter of lien were simply a matter of contract, then it must be governed by the law of the place where the contract was made. It is admitted that the claimant may have his lien according to the law of New Hampshire, while the claimant asks to have the lien allowed according to the law of Vermont where he claims the lien attached, and also asserting that there is a substantial difference between the laws of Vermont and New Hampshire on this subject. No question is raised as to the law that should be applied in giving construction to contracts. Does this lien stand upon any different footing substantially?

Story, in his *Conflict of Laws*, p. 267, after illustrating the principle of the *lex loci contractus* as applied to contracts, says: "But there are some other effects which may be deemed accompaniments, effects, or incidents of contracts, which may here deserve a passing notice. They are properly collateral to them, and arise by operation of law, or by the act of the parties." He mentions many of these incidents—the right of discussion and of division among sureties, the lien of the vendor upon real estate sold for the payment of the purchase-money; also, the lien given for the purchase-money upon goods or merchandise sold by the civil law, the lien of a bottomry bond upon the thing pledged, the lien of mariners on the ship for their wages, the priority of payment *in rem* which the law sometimes attaches to peculiar debts or to particular persons.

In these and the like cases, where the lien or privilege is created by the *lex loci contractus*, it will generally, although not universally, be respected and enforced in all places where the property is found, or where the right can be beneficially enforced by the *lex fori*. And, on the other hand, where the lien or privilege does not exist in the place of the contract, it will not be allowed in another country, although the local law

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where the suit is brought would otherwise sustain it. He then speaks of the difference between personal or movable, and real or immovable, property, and of the *lex rei sitæ* as applied to the latter—to real estate—but as not applicable ordinarily to personal property. He speaks of the law of the domicile of the debtor as being important to be observed in all questions relating to personal property.

In the case before us, the debtor, who owes this plaintiff, resides in Vermont, and also this claimant, and if the law of the domicile of the debtor is to apply in such cases, when the subject-matter is personal property, it would be an additional reason why the attorneys' lien should operate the same here as in Vermont. See, also, pp. 335 and 336. Upon these and similar general principles, we think the law should be held that this claimant, whose services have mainly earned and whose payments have contributed toward the money which is now in the hands of these trustees, should hold according to the law of Vermont, the *lex loci contractus* and the place of domicile of the debtor.

What is the law of Vermont in relation to attorneys' liens? It is said, in *Walker v. Sargeant*, 14 Vt. 247, 253, that "the existence of an attorney's lien for his costs and disbursements upon a judgment recovered in favor of his client, as also upon the proceeds of such judgment and on papers in his hands belonging to the client, has been always recognized in this State since the decision cited from the 2 Aikens." (See 2 Aik. 166.) The question in that case was, whether the attorney's lien was good, and would be protected against the pre-existing rights of third persons; and it was held that it would not be.

In the case referred to, (*Heartt v. Chipman*, 2 Aik. 162) it is held that the attorney has a lien upon the debt which he has prosecuted to judgment for his term fees, attorney fees, and traveling fees, and for all money expended by him in prosecuting the suit; but the extra charges of counsel for argument, etc., are not by the practice of the State thus secured. It was also held in this case, that, as between the creditor and attorney, the money to the amount of the claim of the attorney is his, and cannot be assigned by the former. See, also, *Lake v. Ingham*, 3 Vt. 158, and *Foot v. Tewksbury*, 2 id. 97, in both of which the right to the lien is admitted; and, also, in *Beech v. Canaan*, 14 id. 485.

In *Hutchinson v. Howard*, 15 Vt. 544, it is held that an attorney has a lien upon an award of arbitrators, when a pending suit is referred, to the full extent of all his just claims as attorney in the suit, and that this lien cannot be defeated by attachment by trustee process, even though no notice of the lien had been given by the attorney to his debtor. This seems to enlarge the lien so as to include charges for argument as well

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as other fees, going "to the full extent of all just claims as attorney in the suit," and protecting this lien against being defeated by attachment upon the trustee process, even without any notice of the lien by the attorney to the debtor, notice being held necessary only in case of negotiation of a debt, or to protect a *bona fide* payment of the debt in ignorance of the lien. To the same effect is *Hooper v. Welch*, 43 Vt. 172.

It therefore becomes unnecessary to consider the question raised about the assignment in this case. The trustee process is an equitable proceeding, and we think it consistent with the strictest principles of equity to allow this lien of the attorney in Vermont, upon the judgment which he by his services and payments of money had recovered, even though he was obliged to send it to this State for collection, to be protected against this attachment upon trustee process upon a claim concerning which we know nothing, and which, if ever litigated and settled at all, must probably be litigated and settled according to the laws of Vermont.

We think the claimant is entitled to hold these funds in the hands of the trustees, and that therefore the

Trustees must be discharged.

HOLT v. RICE.

(54 N. H. 398.)

Will — party receiving legacy estopped from contesting.

One who receives a legacy under a will is estopped from contesting the validity of the will, without repaying the amount of the legacy or bringing the money into court.

APPEAL from a decree of the Probate Court admitting the will of Daniel Blanchard, deceased. The appellant was the guardian of a legatee under the will, and while the proceedings were pending on such appeal, the legatee having died, his administrators received the legacy of their intestate from the executor of the said will. Nothing was said at the time of such receipt about the effect thereof upon the appeal, and it was not understood by the administrator of the legatee that it would work an estoppel, but the executor so understood it. The administrator moved for leave to bring the money into court. The questions raised were transferred for the consideration of the whole court.

Pike & Blodgett, for appellants, cited, 2 Redf. on Wills, 748; *Hamblett v. Hamblett*, 6 N. H. 333; 2 Story's Eq. Jur., § 1098.

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Barnard, for the appellee, cited 2 Redf. on Wills, 737; *Hyde v. Baldwin*, 17 Pick. 308; *Hapgood v. Houghton*, 22 id. 483; *Smith v. Smith*, 14 Gray, 532; *Hamblett v. Hamblett*, 6 N. H. 333; *Claggett v. Richards*, 45 id. 363; 1 Story's Eq. Jur., §§ 111-139; *Haven v. Foster*, 9 Pick. 112; *Ludd v. Kenny*, 2 N. H. 340; *Waters v. Travis*, 9 Johns. 464; *Lawrence v. Ocean Ins. Co.*, 11 id. 241; Co. Litt. 145; *Reed v. Dickerman*, 12 Pick. 146.

ISAAC W. SMITH, J. In considering and disposing of this case, this court is sitting as the Supreme Court of Probate; and the question is, whether the legal representatives of the legatee have precluded themselves absolutely by their act in receiving the legacy bequeathed to their intestate from further contesting the execution of the will.

The doctrine, as applied by courts of equity in settling the rights of parties under the will after the same has been fully admitted to probate, with respect to the property to which the will applies, is well settled and familiar. It is, that one who has taken a beneficial interest under a will is thereby held to have confirmed and ratified every other part of the will, so that he will not be permitted to set up any right or claim of his own, however legal and well founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will. Big. on Est. 578; 2 Redf. on Wills, ch. 14, § 6. The cases cited by Mr Bigelow and also by Judge REDFIELD to the above proposition are all cases where the application of the will to the thing devised or bequeathed and the rights of parties under it, was in question. To the same point are *Hyde v. Baldwin*, 17 Pick. 308; *Hapgood v. Houghton*, 22 id. 483; *Smith v. Smith*, 14 Gray, 532, cited in the appellee's brief. In no one of those cases is the effect of recovering a legacy, while proceedings upon the probate of a will are pending, considered. They all relate to the doctrine of election. They all come to this—that a legatee or devisee shall not be permitted to set up a claim inconsistent with or repugnant to the provision made for him in the will, and at the same time avail himself of the benefit which the testator undertook to confer by the will. The questions have arisen, not in courts of probate, but in courts of equity or courts of law, where there was no controversy as to the probate of the will.

The precise question before us seems hardly to have been touched by any American court. In the English practice the point occurs under the head of those entitled to cite the executor to prove the will *per testes*, or in some form, which exact form of proceeding is not found in most of the American States, although it is found in this State, and in Virginia, Tennessee, and perhaps some other States. The authorities in those

jurisdictions, where both forms of proof may be resorted to, are fully in point to show that one who has received a legacy under the proof in common form, may, by paying the amount received on his legacy into court, cite the executor to make proof in solemn form.

In *Hamblett v. Hamblett*, 6 N. H. 333, PARKER, J., certainly recognizes in the most unequivocal manner the doctrine that a legatee who has received a bequest under a will, by restoring to the executor what he has received, may afterward contest the validity of the will. He says (p 337): "It has been repeatedly held in the English ecclesiastical courts, that a legatee who has received a legacy by virtue of a will must bring in the legacy before being permitted to contest the will. The will is founded in principles of justice, and seems to be sound law. The receipt of a legacy is, *quoad* the legatee, an affirmance of the will. It is acting under it, taking the benefit of it, and treating it as a valid instrument. Such affirmance, however, is not an absolute bar against the party seeking to contest the will, though under circumstances of delay, connected with other circumstances, it has been held to preclude the party from contesting the will afterward. 1 Addams, 375; 2 Phillemore, 230, note b; *Hoffman v. Norris*.

"But if the party so having received a legacy afterward desires to contest the will, there is great reason that he should tender to the executor, or bring into court, the amount received. The security of the executor may require this, and if the party can withhold it, he may at one and the same time treat the will as valid and invalid; valid, as authorizing him to hold that portion of the estate to which he would be entitled under it, at the same time he is alleging that, from the insanity of the testator, or some other cause, it is wholly void and inoperative.

"In ordinary cases, therefore, when a party seeks to repudiate a will as insufficient, he must do so wholly and entirely by refusing, until it has been established, to receive the benefit of it; or, if any thing has been received, by returning it to the executor, or placing it in the custody of the court, that the executor may have it in case the judgment should be against the validity of the will." *Bell v. Armstrong*, 1 Addams, 365, and *Braham v. Burchell*, 3 id. 243, are cited to this doctrine.

The doctrine is stated in 1 Jarm. on Wills (2d Am. ed.), 214, as follows: "A party who has received a legacy under a will cannot be permitted to contest the validity of such will without repaying the amount of the legacy, or bringing the money into court; and the rule applies even if the party was a minor when the legacy was received,"—citing *Hamblett v. Hamblett*, and the English cases there referred to.

In *Bell v. Armstrong* (decided in 1822) the precise question was dis-

tinctly raised, and decided in favor of the right of the legatee to restore what he had received, and contest the will. Sir JOHN NICHOLL in that case says: "Much is insisted in the protest on the brother's *acquiescence* in the executor's taking probate of the will. Now, without at all adverting to the grounds upon which that acquiescence is said to have been founded, I may observe, that a *mere* acquiescence (that is, an acquiescence accounted for by no special circumstances) on the part of the next of kin, to an executor's taking probate, is no bar whatever to his calling it in, and putting the executor on proof of the will. If it were, no probate could be called in by a next of kin, unless immediately upon its becoming known to him that probate had been taken—the very contrary of which is matter of every day's experience.

"Nor, again, is acquiescence a bar, even though accompanied, as in this case, by a receipt of a legacy under the very will sought to be controverted. This has been determined in a great variety of cases. For instance, in that of *Core* and *Spencer*, which occurred here in 1796, where Spencer, the executor, was cited to bring in the probate of a will taken in 1788, eight years before, at the suit of Core, whose mother had received an annuity under that will for five of the eight years, and she Core herself, her mother dying at the end of the fifth year, for the remaining three. Spencer, in that case, appeared under protest, as the executor has in this, and contended that Core was barred from putting him on proof of the will; but the court thought otherwise, and overruled the protest. That, however, was an infinitely stronger case to build this argument upon than the present, if mere acquiescence and receipt of a legacy could bar. In the judgment delivered by my predecessor (Sir WILLIAM WYNNE) in the case of *Core* and *Spencer*, he adverted to various cases—*Pyefinch v. Palmore*, formerly *Pyefinch*, Prerog. 1767, *Ashby v. Hay and Thrale*, Prerog. 1768, *Legge and others v. Brookman* formerly *Cowdery*, Prerog. 1777—all authorities to the same point. At the same time it was held in every one of these (and indeed they were *principally* cited in that case of *Core* and *Spencer*, for the purpose of showing) that the legatee must *bring in* his legacy before being permitted to contest the will, under the authority of which I hold that I am bound, in overruling this protest, to direct the legacy to be brought in before the brother proceeds. The bringing in of his legacy will be a test of the sincerity of his opposition to the validity of the will, and will prove it to be not merely vexatious. At the same time it will be security to the executor, in case of the next of kin being condemned in costs."

The same doctrine was also held and applied by the same great judge in *Braham v. Dorchell*, 3 Add. 243, decided in 1826.

In the case before us, the probate of the will was contested by the guardian of the legatee, and while the proceedings were pending in this court on appeal from a decree of the judge of probate, the legatee having died, his administrators received the legacy of their intestate from the executor of his father's will. We think this circumstance alone is not sufficient to bar the further prosecution of this appeal. The administrators might compromise and adjust the controversy as to the validity of the will. If they did so, that would of course be an end of this appeal. Receiving the legacy is doubtless evidence of an intention to affirm the will, and so of an intention to abandon proceedings in which its validity is questioned. But the administrators here both say the effect of receiving the legacy upon this appeal was not in their minds; that they did not understand they were thereby precluding themselves from further contesting the validity of the will, one of them saying he signed the receipt with the understanding that it was not to have any effect on the suit; and it is conceded by all that the effect of receiving the money was not mentioned at the time it was paid, although the executor understood in his own mind that it would constitute a bar to the further prosecution of the appeal. There has been no great delay, and there is no other circumstance, unless it be that the administrators were lawyers, to take this case out of the rule, as it is understood to be settled by the cases referred to.

We think the question in this case really is whether there was, in fact, a mutual understanding that the appeal should be no further prosecuted at the time the legacy was paid and received. The fact that the administrators were lawyers, doubtless has a bearing upon the question of how they understood it. The act was beyond question inconsistent with a denial of the validity of the will; and a lawyer probably ought to have so understood it, at least better than one less accustomed to matters of that sort. But they say they did not so understand it, and we think the evidence is, upon the whole, insufficient to show affirmatively that there was an agreement of minds between the parties that the appeal should not be further prosecuted. That being so, they should be allowed to repay the money to the executor, or pay the same into court; and thereupon the proceeding to test the validity of the will should be permitted to proceed.

Appellant's motion granted.

NOTE.—In *Chapman v. Montgomery*, 63 N. Y. 221, it was held that heirs at law or next of kin, claiming in hostility to a will, cannot maintain an action to obtain a construction thereof.

Currier v. Sutherland.

CURRIER v. SUTHERLAND.

(54 N. H. 475.)

Sale — of exempt property — may be fraudulent as to creditors — homestead.

J. S. owning premises which were exempt from execution as a homestead, conveyed them to plaintiff by a deed which was fraudulent and void as to creditors; but J. S. continued to occupy them. The premises were afterward sold under an execution against J. S., and defendant derived title through such sale. *Held*, (1) that the right to a homestead was not assignable, and therefore, that whatever rights J. S. might have had, the plaintiff could not avail himself of them; and (2) that the conveyance might be fraudulent and void as to creditors although the property was exempt from levy. (*See note, p. 150.*)

TRESPASS *quare clausum fregit* by Currier against Sutherland. The opinion states the case. The verdict was for the defendant, and the plaintiff moved for a new trial.

H. Bingham and Wood, for plaintiff.

C. W. & E. D. Rand, and *Larry & Carpenter*, for defendant.

HIBBARD, J. It may be assumed that the plaintiff, at the time the alleged trespass was committed, was in possession of the premises in controversy. This is claimed by him, and is not denied by the defendant. That this is enough to entitle the plaintiff to maintain trespass against a mere wrong-door is very true, but the decision of this case cannot turn on so narrow a view.

Both parties claim to own the premises, and the evidence of their respective titles is before us. Both claim under Eunice Smith; and it is conceded that on May 1, 1855, she owned the property, and that it was her homestead place, and was for that reason exempt from attachment or levy. On that day she conveyed it to the plaintiff, and this conveyance constitutes his only title. But fifteen years afterward, Mr. Carpenter, having an execution against Mrs. Smith, caused it to be levied upon the premises, and the defendant claims under the title thus acquired. That this levy was made upon a valid execution and in due form of law has not been disputed. The great question between the parties therefore is, Which of these is the superior title? The plaintiff's, being earlier than the defendant's, must prevail, if acquired in good faith and for a valuable consideration. But the jury, by returning a verdict for the defendant, have found that the plaintiff's deed was fraudulent and void as to Carpenter; how then does he seek to overcome that obstacle?

I. The plaintiff contends that although his deed may have been fraudulent and void against a creditor making a legal levy, still, if Eunice Smith continued to make her home on the premises at the time of the levy, claiming a homestead there, the levy was void because it was made in disregard of her homestead right. His position is, that Mrs. Smith, by continuing at the time of the levy to make her home on the premises, claiming a homestead there, relieved him from the ordinary consequences of attempting to hold property against creditors by virtue of a conveyance which is found to be fraudulent and void as to such creditors.

But we do not see how the plaintiff can be permitted to invoke to his aid the occupation of the premises by Mrs. Smith when the levy was made. Whether she was or was not affected by the levy, or whether, if actually in possession down to the time of the trespass, she could or could not have maintained this action against the defendant, are questions which we have no occasion to determine now. That she was in possession, and may have had a right as against the defendant to remain in possession, entitles the plaintiff to maintain no action against the defendant. A right to a homestead on the part of Mrs. Smith cannot be set up in this way to settle the rights of other parties. Mr. Carpenter may have supposed, because she had conveyed the premises, that she had abandoned her homestead. That she did not request the officer to set it out, has a tendency to show that she had abandoned it. A creditor who thus levies in good faith upon an estate to which a homestead right appertains, no application being made to have it assigned, takes his title, it is true, subject to a liability to a subsequent assignment; but when the entire value has been applied on his execution, we see no occasion for holding that he shall not be entitled to whatever may remain after a homestead shall have been subsequently assigned, which must be the effect of holding this levy void.

Although Mrs. Smith may have been entitled to have the whole premises set off to her as her homestead, she could not assign this right to the plaintiff. A right to a homestead is not assignable. *Gunnison v. Twitchel*, 38 N. H. 62, 68; *Bennett v. Cutler*, 44 id. 71; *Judge of Probate v. Simonds*, 46 id. 363, 368. "The right of homestead, before the same has been set out and assigned, is * * only an inchoate right, personal to the parties in whom it exists." FOWLER, J., in *Foss v. Strachn*, 42 N. H. 42. If Mrs. Smith had transferred her occupation and right of possession to a tenant, the exemption might cease. *DOE, J.*, in *Austin v. Stanley*, 46 N. H. 52. That she was or had been the owner of the property in controversy,

instead of simply having a homestead right in it, cannot affect the question in this view.

If Mrs. Smith had a homestead right in 1870 at the time of the levy, it was by virtue of the act of 1868, ch. 1, § 33, which gives such right not exceeding \$500 in value to "the wife, widow, and children of every person who is owner of a homestead, or of any interest therein, occupied by himself or herself, and his or her family, * * for and during the life of such wife or widow, and the minority of such children." If she had a homestead right in 1855, at the date of the deed, it was by virtue of the act of 1851, ch. 1089, § 1, which gave such right not exceeding \$500 in value to "the head of each family." Whether she had a minor child in 1870, or was the head of a family in 1855, does not appear. But that she had at the time of the levy a homestead right in the premises in controversy, unless she had lost it by abandonment, has not been controverted by the defendant, nor has any objection been raised against the plaintiff's deed, because it was not made with the approval of the judge of probate, as was required if she had minor children. Act of 1868, ch. 1, § 35.

The course of proceedings for setting off a homestead by "the officer to whom any writ of execution against the husband is delivered, to be levied on his real estate," is pointed out in the Gen. Stats., ch. 124, § 5. We find no statutory provision, in force since the enactment of the General Statutes, which in terms provides for setting off a homestead when the execution debtor is not a "husband;" but the defendant has interposed no objection on this account. If Mrs. Smith, being entitled to a homestead, had applied to the officer making the levy to set it out to her, it would have been his duty to do so; and if he had disregarded her application, the levy would have been void. *Fogg v. Fogg*, 40 N. H. 282; *Tucker v. Kenniston*, 47 id. 268.

But no application having been made by her to the officer for an assignment of a homestead, she waived her right to an assignment under the statute, and the creditor under such circumstances was at liberty to disregard her homestead right (*FOSTER, J., in Barney v. Leeds*, 51 N. H. 253, 270); but her right, if any, was not lost by the neglect, but may yet be secured to her by resort to other forms of proceeding. *Fletcher v. State Capital Bank*, 37 N. H. 369, 395; *Fogg v. Fogg*, 40 id. 282, 286; *Barney v. Leeds*, 51 id. 253, 269, 271, 272, 279; *Tidd v. Quinn*, 52 id. 344.

Although the case states that the whole value of the premises in controversy is less than \$500, "the only way to settle that fact is upon such application to have a homestead assigned in some of the ways pro-

vided by law, for that is the only appraisal recognized by the statute." SARGENT, C. J., in *Tidd v. Quinn*, 52 N. H. 345. If, however, as seems to be a conceded fact, the value of the entire premises was and is clearly less than \$500, the defendant may, upon a proper application by Mrs. Smith for the assignment of a homestead, unless she has already abandoned her homestead right, be divested of all right in the property during the time she may see fit to occupy it as a homestead. Whether after the termination of a homestead right, not claimed at the time of a levy and subsequently set out upon petition, the levying creditor may, as suggested in Mr. Carpenter's argument, hold the reversion in the part assigned as a homestead, which in this case it may be supposed would be the entire estate, contrary to what would have been the result if application had been made in the first instance to the officer to cause a homestead to be set out, is a question we have not considered.

It is very clear that the instruction requested by the plaintiff as to the effect, if his deed was fraudulent and void as to creditors, of the continued occupation by Mrs. Smith of the premises as her homestead, was rightly denied, and that the instruction actually given was correct.

II. But the plaintiff's counsel has strenuously contended that he was entitled to a verdict, upon the ground that the conveyance to him could not be fraudulent. His position is, that as the creditors of Eunice Smith could not lawfully attach or levy upon her homestead, it being of less value than \$500, "it follows that by no earthly possibility could such conveyance be a fraud on her creditors." As there was no ground for a verdict in favor of the defendant, except because the plaintiff's deed was fraudulent as to creditors, it appears to be true, if the deed could not possibly be fraudulent as to creditors, that the plaintiff was entitled to a verdict. The case does not show that this position was taken at the trial, but we have considered it.

Is it, then, impossible for a conveyance of property which is exempt from attachment or levy to be fraudulent as to creditors? Authorities upon both sides of this perplexing question are cited in 1 Story's Eq. Jur., §§ 367, 368. We have also found additional authorities on both sides of the question, besides those cited by counsel in the present case. We refer to *Woodworth v. Paige*, 5 Ohio St. 70; *Wood v. Chambers*, 20 Tex. 247; *Dreulzer v. Bell*, 11 Wis. 114; *Lishy v. Perry*, 6 Bush (Ky.), 515; *Crummen v. Bennet*, 68 N. C. 494; *Piper v. Johnston*, 12 Minn. 60, 69; *Beals v. Clark*, 18 Gray, 18; *Stevenson v. White*, 5 Allen, 148; *Rayner v. Witcher*, 6 id. 292; *Mannan v. Merritt*, 11 id. 582. It may be remarked that the opinions in those cases generally contain but little reasoning, and do not indicate that the question was much considered.

The argument of Mr. Bingham upon this point is certainly plausible, but after much hesitation we have concluded that it is untenable, and we are of the opinion that it is not impossible for such a conveyance to be fraudulent as to creditors. That property alleged to have been conveyed in fraud of creditors was exempt from attachment or levy is a circumstance to be weighed by the jury in determining upon the validity of the conveyance, but it is not conclusive.

The exemption of a homestead from attachment or levy is a personal privilege which the law gives to the owner, in order that he or his family may occupy it; not that, if they cease to have occasion to occupy it, he may place it beyond the reach of his creditors. Mrs. Smith had a right to occupy the homestead in controversy so long as she lived. She had a right to sell it, and purchase another homestead with the avails, and occupy that. A *bona fide* exchange of this homestead for another probably would have been sustained against an existing attachment had there been one (BELLOWES, J., in *Tucker v. Kenniston*, 47 N. H. 266; *Black v. Epperson*, 40 Tex. 162); but she could not lawfully give it away, as against the rights of her creditors. If she had been about to take up her permanent abode in another place, there can be no doubt that her homestead, or the avails of it, unless again invested in exempted property, would have justly belonged to them. How, then, could she give it away, if unable longer to occupy it, without committing a fraud upon them? It was hers to occupy, not to give away. The law does not exempt the avails of it when sold. On the contrary, if the plaintiff had made an honest purchase, and given his note for the full consideration, the whole might have been held by trustee process. *Manchester v. Burns*, 45 N. H. 482, 488; *Wooster v. Page*, 54 id. 125, 127.

If Mrs. Smith, after her conveyance to the plaintiff, had purchased another homestead, and removed to it from the one in controversy, clearly the new homestead would have been exempt from attachment or levy. And can it be pretended that the old one would have remained exempt? If it would, then nothing can prevent an insolvent debtor from "salting down" as many successive homesteads by giving them to his friends to hold in trust for him, as the funds of his creditors in his hands will enable him from time to time to buy. If it would not, it must be because the conveyance of it was fraudulent and void as to creditors from the beginning. It is absurd to say that a conveyance, which is honest and valid when executed and for an indefinite time afterward, can be made fraudulent and void by the subsequent acts of the grantor, over which the grantee has no control.

It may be that Mrs. Smith, after making an absolute conveyance, might retain her homestead right against everybody but her grantee (*Orummen v. Bennett*, 68 N. C. 494; *Cox v. Wilder*, 2 Dill. C. C. 45; *Vogler v. Montgomery*, 54 Mo. 377); as she might, after making a mortgage of it, against everybody but the mortgagee. It may be that the rights of creditors as against her might be controlled by her continued occupancy. To-day, while she occupies it, they might not be able to levy on the property; to-morrow, after she had abandoned it, they might. A levy made while she was in the occupation, if she requested the officer to cause a homestead to be set out to her, might be void, and therefore incapable of being made good by her subsequent abandonment; if made after she had ceased to occupy, it might be valid. But we cannot say that the title of the plaintiff, if it was good at its inception, could be made bad by her subsequent purchase of and removal to a new homestead. That would be the same thing as to say that his title was good so long as he took nothing by his deed, but bad the moment his grantor permitted him to enter into possession.

Suppose this property to have been worth \$1,000, and to have been conveyed without consideration in trust for the grantor: whether Mrs. Smith, though she had conveyed it by an absolute deed, might, so long as the grantee permitted her to remain in possession, have a homestead right of which no levying creditor could divest her, we need not now decide, but that the levying creditor would hold all but the homestead right against the grantee, the grantor, and the whole world, no one will deny; and so far as the grantee is concerned, it is not easy to tell what would prevent his holding that also. It seems that such a conveyance, being confessedly fraudulent in part, must be held to be fraudulent in toto: and if a grantee, without consideration of a homestead place worth \$500 more than the amount exempted by law, can hold nothing against creditors, we look in vain for reasons why, if the entire value of the place was \$500 or less, he should hold the whole.

Under the liberal statutes now in force, an insolvent debtor may easily have \$1,000 or more invested in beasts of the plow, a cow, a hog, and a pig, tools of his occupation, a pew in a meeting-house, a sewing-machine, a library, furniture and other articles, which are exempted from attachment or levy. But this is that he may be permitted to use them. It is a privilege personal to him, and which may be waived by him. If, no longer needing them, he gives them away, how can the gift be sustained against creditors? Why should they not have the property as soon as he ceases to need it for the purposes for which the law protected it? That he commits a fraud upon them if he gives it away seems too plain

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to require argument. If, instead of giving it away because he no longer needs it, he gives it away and purchases other similar property to supply its place, the absurdity of holding the gift, to be valid, though really no greater, becomes more obvious.

Suppose, after giving it away, he dies : suppose the gift is made in view of approaching death : shall the donee hold the property, or shall the administrator of the donor hold it for the benefit of his creditors ? Manifestly there can be but one answer to this inquiry. If the estate is insolvent, it must go to the administrator. And, surely, it will not be contended that the donee may hold it absolutely against creditors during the life-time of the donor, but must lose it the moment he is dead. The absolute owner of property cannot be divested of his title by the death of a former owner. If the donee in such a case owns the property as against creditors while the donor lives, he certainly must own it as against the rights of creditors after he dies. And it is equally certain that the creditors of the donor might be defrauded by his giving it away in his life-time if the donee could hold it after his decease.

Although the owner of a homestead place worth no more than \$500, if he make a seasonable application to have a homestead set off to him whenever a levy is about to be made, may hold it, including the reversion, beyond the reach of his creditors during his life, it is plain that he might have a fraudulent intent to give it to a friend, to the exclusion of creditors, after his decease, and might actually defraud them if, though unable to give any title by making a will, he could give a good title by making an absolute deed.

In the case before us it would appear that Mrs. Smith, after making an absolute conveyance to the plaintiff, was permitted for fifteen years to occupy the premises as her homestead, and that the plaintiff never entered into possession until after one of her creditors had levied upon the property. If it was impossible for this conveyance to be fraudulent as to creditors, then, certainly, every insolvent owner of a homestead, in view of approaching death, or in view of death at some indefinite future time, though unable to devise it, can convey it without consideration, to be held in trust for his own use during his life, and at his death to go to the grantee, whether he dies within a day, or a year, or a quarter of a century.

The ingenious suggestion of the plaintiff's counsel, that, although perpetual motion in mechanics yet remains undiscovered, an instance of perpetual motion in law will occur if the verdict in this case is sustained, upon the ground that if the defendant by virtue of Carpenter's levy can turn the plaintiff out of possession, Mrs. Smith by virtue of her homestead

right can then turn the defendant out, and the plaintiff by virtue of his deed from Mrs. Smith can then turn her out, and this may be repeated *ad infinitum*, presents a somewhat troublesome illustration. But whatever effect an absolute conveyance by Mrs. Smith, without any change of occupancy, may have had upon her homestead right as against creditors, it seems that, if the plaintiff has turned her out of possession by virtue of an absolute conveyance from her, she must be deemed to have abandoned the occupation of the premises as her homestead, and will not be entitled to turn the defendant out of possession after he had succeeded in turning the plaintiff out. We intend, however, to leave the question of abandonment, as it may hereafter arise between the defendant and Mrs. Smith, to be decided upon all the facts as they may then appear.

Numerous additional illustrations in support of the conclusion we have reached may be found in the argument of Mr. Carpenter upon this branch of the case. Several positions taken by him remain unanswered, and we have failed to discover how they can be answered. We deem it sufficient to refer to them, instead of occupying space by incorporating them in this opinion.

Judgment on the verdict.

NOTE.—The majority of cases hold that a conveyance of exempt property cannot be charged as made in fraud of creditors for the reason that as the creditors had no right to have it applied in payment of their debts while in the possession of the debtor they could not be defrauded by its conveyance and could not follow or reach it in the hands of the alleged fraudulent purchaser. *Bond v. Seymour*, 1 Chand. 40; *Dreitzer v. Bell*, 11 Wis. 114; *Pike v. Miles*, 23 id. 164; *Winebrenner v. Weisinger*, 3 Monr. 33; *Dearman v. Dearman*, 4 Ala. 521; *Planters' Bank v. Henderson*, 4 Humph. 75; *Smith v. Allen*, 39 Miss. 469; *Legro v. Lord*, 10 Me. 161; *Lisby v. Perry*, 6 Bush. 515; *Vaughan v. Thompson*, 17 Ill. 78; *Wood v. Chambers*, 20 Tex. 247; *Foster v. McGregor*, 11 Vt. 595; *Bean v. Smith*, 2 Mason, 252; *Garrison v. Monaghan*, 33 Penn. St. 262; see, also, *Bump on Fraud. Conv.* 263, 264; *Freeman on Executions*, § 138.

The latter author says: "The kinds of property which may be levied on as that of the fraudulent grantor embrace every thing which could have been subjected to execution in his hands if no conveyance had been made. In other words the laws against fraudulent conveyances are applicable to every species of property which the grantor's creditors could have lawfully had appropriated to the payment of their demands. But it is evident that creditors cannot be defrauded, hindered nor delayed by the transfer of property which neither at law nor in equity can be made to contribute to the satisfaction of their debts. Hence it is almost universally conceded that property which is by statute exempt from execution cannot be reached by creditors on the ground that it has been fraudulently transferred."

In *Smyth on Homesteads and Exemptions*, § 555, it is said: "Under the later decisions, it is a rule of law, now well established, that the debtor or head of a family may dispose of the exempt property in any way he may think proper; and a purchaser from him takes them free and may maintain an action against the sheriff for a subsequent levy and sale."

That a bankrupt may sell exempt property see *McFarland v. Goodman*, 13 Am. L. Reg. 697; *Schultz v. Schultz*, 2 Biss. 248.

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In *Allen v. Cook*, 26 Barb. 374, it was held that the homestead right was a purely personal one, and that it did not operate to destroy the lien of a judgment but only to suspend it, so that if the householder sold his homestead premises the right of exemption was gone and the premises liable in the hands of the grantee for all previous liens of judgments recovered against the grantor. See, also, to same effect, *Smith v. Brackett*, 36 Barb. 571; *Folsom v. Casli*, 5 Minn. 333. But in *Freeman on Executions*, § 249 (a very careful and exhaustive treatise), it is said: "The lien of a judgment and of an execution is almost universally regarded as arising from the right to sell property thereunder. And hence where the right of sale cannot be asserted, the existence of the lien must be denied. It would follow as a logical result, from the application of this general principle, that a judgment rendered after the creation and before the abandonment of a homestead cannot be a lien thereon, and as a result of the last proposition it must follow that a homestead may be sold or mortgaged, and that the title of the vendee or mortgagee will be paramount to that of a prior judgment-creditor." Citing the following cases: *Bowman v. Norton*, 16 Cal. 214; *Marriner v. Smith*, 27 id. 649; *Deffels v. Pico*, 46 id. 289; *Englebrecht v. Shale*, 47 id. 627; *Green v. Marks*, 25 Ill. 221; *Hume v. Gossett*, 43 id. 297; *Bonnell v. Smith*, 53 id. 377; *Coe v. Smith*, 47 id. 225; *Lamb v. Shays*, 14 Iowa, 667; *Parker v. Dean*, 45 Miss. 409; *Bliss v. Clark*, 39 Ill. 590; *Fishback v. Lane*, 36 id. 437.—*REP.*

FOOTE V. MERRILL.

(54 N. H. 490.)

Damages — measure of in trespass quare clausum for cutting down and carrying away trees.

In trespass *quare clausum fregit*, and for cutting down and carrying away trees, the measure of damages is the amount of injury which the plaintiff suffered from the whole trespass taken as a continuous act; the increased value of the trees, occasioned by the labor of the defendant in converting them into timber, is not to be included.

TRESPASS, by Foote against Merrill, for breaking and entering the plaintiff's close and cutting down and carrying away trees. The parties are owners of adjoining lots, and the question in dispute at the trial was, On which side of the dividing line between them were the trees cut? As to damages, the court instructed the jury that they might give the value of the timber after it was cut and made ready to be hauled off the land, to which the defendant excepted. The verdict was for the plaintiff, and the defendant moved for a new trial.

Carpenter (with whom was *Putnam*), for plaintiff, cited *Martin v. Porter*, 5 M. & W. 351; *Wild v. Holt*, 9 id. 672; *Morgan v. Powell*, 3 Q. B. 278.

Felton (with whom were *H. Bingham* and *S. B. Page*), for defendant, cited *Sayer's Law of Damages*, 1; *Luther v. Winnistimmet Co.*, Cush.

171; *Cole v. Tucker*, 9 Tex. 266; *Wallace v. Goodall*, 18 N. H. 456; *Belnap v. Boston & Maine Railroad*, 49 id. 358; *Longfellow v. Quimby*, 33 Me. 457.

HIBBARD, J. The gist of the action of trespass *quare clausum fregit* is the disturbance of the possession. Whatever is done after the breaking and entering is held to be but aggravation of damages. If the plaintiff had failed to prove the cutting of his trees, he might still have recovered in this action for the breach of his close (*Brown v. Manter*, 22 N. H. 468, 472); but if he had failed to prove the breach of his close, he could not have recovered for the taking and carrying away of his trees. *Eames v. Prentice*, 8 Cush. 337.

It may be assumed, although it is not stated in the case, that the court instructed the jury that the plaintiff was entitled (as he manifestly was) to recover for the injury, if any, which was done to his soil, as well as "the value of the timber after it was cut and made ready to be hauled off the land." It is to be inferred that the court permitted the plaintiff, although he had elected to bring trespass for breaking and entering his close and cutting down and carrying away his trees, to ignore the allegation and proof of cutting, and recover the damage done by breaking and entering the close and carrying away the trees, as if the cutting had been previously done by the plaintiff himself. The plaintiff has, therefore, in this form of action, recovered a verdict, which includes the value of the defendant's labor in cutting and trimming the trees. That this is not a just rule of damages is manifest although it may be probable that but a small proportion of the amount of the verdict in this case was given for the added labor. Had the defendant set fire to the plaintiff's trees and destroyed them, the measure of damages would have been their value as they stood on the land; and we cannot say that he justly ought to pay any more for cutting and removing than for destroying them, nor that the plaintiff justly ought to receive any more in one case than in the other. If the plaintiff by pursuing a different remedy might have availed himself of the benefit of the defendant's labor, this may afford no reason for giving it to him in the form of action he has chosen to adopt.

The defendant having wrongfully cut and trimmed the plaintiff's trees, and it being impossible to separate the original property in them from the value subsequently added, it is unnecessary to cite authorities to show that the plaintiff, after they were cut and trimmed, remained the owner of the timber made from them, free from any lien or claim of the defendant for his labor, and that he might therefore have lawfully

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taken it peaceably into his possession. It is only where the identity of the original material has been destroyed, or where its value is insignificant compared with the value of the article manufactured from it, or to which it has been annexed, that the law is otherwise. *Wetherbee v. Green*, 22 Mich. 311; 7 Am. Rep. 653. The plaintiff might also have maintained replevin for the timber (*Davis v. Easley*, 13 Ill. 192; *Wingate v. Smith*, 20 Me. 287); or he might, according to numerous authorities, have recovered its full value at the time it was carried away by bringing trover (*Brown v. Sax*, 7 Cow. 95; *Baker v. Wheeler*, 8 Wend. 505; *Rice v. Hollenbeck*, 19 Barb. 664; *Grant v. Smith*, 26 Mich. 201; *Ellis v. Wire*, 33 Ind. 127; 5 Am. Rep. 189); and according to the doctrine of *Adams v. Blodgett*, 47 N. H. 219, he might have elected any day prior to the date of his writ at the time of the conversion. Perhaps the same result might as well have been reached in trespass *de bonis asportatis*; but the difficulty of allowing the original taking to be abandoned and a later one adopted has probably been thought greater in that form of action than in trover, although judges have sometimes taken a different view. "It would be absurd to say that the original owner may retake the thing by an action of replevin in an improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages."—RUGGLES, J., in *Sillsbury v. McCoon*, 3 N. Y. 384; but in *Cushing v. Longfellow*, 26 Me. 306, the plaintiff waived the breaking and entering and the cutting, and sued in trespass for taking, carrying away, and converting mill-logs; and it was held, that the measure of damages was the value as it was the moment after they were severed; and that the plaintiff had no right to select any other place than that where the injury was originally done, although he might have seized the logs at a later stage, and after they had become more valuable; but the opinion of the court states that in trover the rule is different.

In *Moody v. Whitney*, 38 Me. 177, which was trover for mill-logs cut upon the plaintiff's land by the defendant, and hauled by him two or three miles, the same measure of damages was, however, adopted, it being held that the plaintiff could not recover the enhanced value of the logs without evidence of a distinct conversion after they were hauled, as if the plaintiff had regained possession, and there had been a subsequent conversion by the defendant; or, perhaps, if he had not regained the possession, but there had been a subsequent demand and refusal, upon the ground that, where a party without authority mingles his labor with the lumber of another, "if the party who would be entitled to the whole of the mixture makes no attempt to obtain the whole, but resorts to his

action of trover, the damages would be, not the value of all that which he might lawfully take, but only of that which was first wrongfully converted by the act of mingling."

According to the cases last cited, the present plaintiff, even if he had brought trover, would have been entitled to recover "the value of the timber after it was cut," but not (as the court instructed the jury) after it was "made ready to be hauled off the land." A similar doctrine was applied in *Weymouth v. C. & N. W. R. Co.*, 17 Wis. 567, which was trover against the defendant, who had by mistake taken the plaintiff's wood at Farmington, and carried it to Janesville and there mingled it with other wood, so that it could not be identified, the court holding that the plaintiff, who had demanded the wood at Janesville, could not recover its value with the cost of transportation added; but in that case the wood was not cut by the defendant on the plaintiff's land.

If a plaintiff in trover, whose trees have been cut and increased in value by a trespasser, may recover their value at any time he may elect to treat as the time of their conversion, or even their value the moment after they are severed from the soil, he may sometimes recover more than the actual injury he receives; but it is because such a result is incidental to the adoption of that form of action, while in the present case the form of action adopted by the plaintiff presents no obstacle to giving him the actual damage he has suffered by the commission of the trespass alleged in his declaration, and no more.

The reported cases on the subject of damages in trespass *quare clausum fregit*, where the defendant has without authority severed minerals or timber and removed them from the plaintiff's land, are far from uniform. *Martin v. Porter*, 5 M. & W. 351; *Wild v. Holt*, 9 id. 672; *Morgan v. Powell*, 3 Q. B. 278 (43 E. C. L. 734); *Maye v. Tappan*, 23 Cal. 306, and *Goller v. Fett*, 30 id. 481, were actions of that form. The first three were for mining coal and carrying it away; and the decision was, that the owner of the land in such a case is entitled to recover the value of the coal at the time when it first became a chattel by being severed from its place. In the last two, which were for extracting, carrying away, and converting gold and gold-bearing earth, the same rule was applied, the measure of damages being held to be the value of the gold-bearing earth immediately after it was separated from the surrounding soil, to be estimated by deducting from the value of the gold extracted from it the expense of extracting it. Following these authorities are *Bennett v. Thompson*, 13 Ired. 146, and *Smith v. Gonder*, 22 Ga. 353, the latter of which was (and probably both were) trespass *quare clausum fregit*, and for cutting and carrying away trees. A similar

rule was applied in the recent case of *Llynvi Co. v. Brogden*, L. R., 11 Eq. 188, which was a bill praying for an account for mining and carrying away coal.

But in *Wood v. Morewood*, 3 C. B. 440 (43 E. C. L. 810), Baron PARKE ruled that, even in trover for coal mined by the defendant upon the plaintiff's land, if the defendant "acted fairly and honestly, in the full belief that he had a right to do what he did, they [the jury] might give the fair value of the coals, as if the coal-fields had been purchased from the plaintiff;" and in *Forsyth v. Wells*, 41 Penn. St. 295, which was trover for coal mined by mistake, LOWRIE, C. J., said that the rule of damages adopted in *Martin v. Porter* and other like cases "does not truly mete out just compensation;" and it was held by a majority of the court that the defendant "ought not to have been charged with the value of the coal after he had been at the expense of mining it, but only with its value in place and such other damage to the land as his mining may have caused;" but this view is criticised by STRONG, J., in an opinion of the same court in *Lyon v. Gormley*, 53 Penn. St. 261. Whether such a rule of damages can be sustained in trover seems more than questionable, although it has been commended by a high authority as "the just rule." Sedg. Meas. of Dam. (4th ed.) 629 [537], note 1. It would be hard to suppose that the plaintiff lost his coal and that the defendant found and converted it while it remained a part of the realty, to say nothing of giving "other damage to the land" in an action of trover for converting personal property. But we are of the opinion that where there is nothing in the form of action adopted which renders this an inconsistent rule of damages, it presents substantially the correct rule. It seems well adapted to actions of trespass, for entering land and severing and removing minerals or timber from it, and has been often applied in such actions.

United States v. Magoon, 3 McLean, 171, was trespass for entering upon lands of the United States and digging and carrying away ore. "The plaintiffs contended that they were entitled to the value of the ore after it was dug; but the court instructed the jury that that was not the measure of damages, but the injury done to the soil by the trespass; that the digging and carrying away by the same person is presumed to be a continuous act, and the lead ore removed must be considered an aggravation of trespass upon the soil." This instruction was not excepted to.

Stockbridge Iron Co. v. One Iron Works, 102 Mass. 80, was tort, praying for relief in equity for injury to the plaintiff's land by digging and excavating drifts, caves, and openings into and under it, and taking

ore therefrom. "The value of the ore," the opinion states, "is to be estimated as it lay in the bed, and not as it was after the defendants had increased its value by removing it. To this is to be added the damage done to the real estate."

Longfellow v. Quimby, 38 Me. 457, was trespass for a breach of the plaintiff's close, and cutting and carrying away trees. The plaintiff was held to be entitled to recover for the value of the trees, and for the injury occasioned by cutting them prematurely, and for the injury done to the land.

Chipman v. Hibberd, 6 Cal. 162, the case states, was an "action for damages for cutting down growing trees." The measure of damages was held to be, not "the actual value of the trees for firewood, but the damage done to the land by reason of destroying them," to be "estimated by all the circumstances and the purposes for which the trees were used or designed."

If the owner of timber, cut upon his land by a trespasser, gets possession of it increased in value, he has the benefit of the increased value. The law neither divests him of his property, nor requires him to pay for improvements made without his authority. Perhaps in trover, and possibly in trespass *de bonis asportatis*, he may be entitled to the same benefit. But we see no occasion for giving it to him where he brings his suit for the whole trespass of breaking and entering his close and cutting down and carrying away his trees as a continuous act. The plaintiff is entitled to be compensated according to the magnitude of his loss. The defendant ought only to be liable to compensate him according to the magnitude of his loss. The inquiry should be, How much was the plaintiff injured by the breaking and entering of his close, and the cutting down and carrying away of his trees? The true measure of damages is the amount of injury which the plaintiff has actually suffered from the whole trespass. If the trees were worth no more to the plaintiff to stand than to the defendant to be cut into timber at that time, their value as timber, with the reasonable expense of cutting deducted, was the measure of the injury which was done to the plaintiff by cutting them. This is not the rule of damages which was adopted by the court. The instruction to the jury was erroneous, because it allowed the plaintiff to recover a verdict which included the value added to the timber by the defendant's labor.

The instruction given, unless it was assented to by the plaintiff, as it doubtless was in this instance, was clearly liable to a valid exception by him. His trees may have been prematurely cut: they may have been ornamental trees or fruit-trees: the value after they were severed from

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the soil may have been but a small part of the real injury from cutting and removing them. "The trees considered as timber may, from their youth, be valueless, and so the injury done to the plaintiff by the trespass would be but imperfectly compensated, unless he could receive a sum that would be equal to their value to him while standing upon the soil." GILCHRIST, J., in *Wallace v. Goodall*, 18 N. H. 456. A rule of damages, which is manifestly unsound when applied to the cutting of trees which are more valuable while standing than after they are cut, cannot be usefully employed in other cases.

Adams v. Blodgett, 47 N. H. 219, may seem to be in conflict with the result we have reached, but it is not. That action, as it is described in the statement of facts, was trespass for breaking and entering the plaintiff's close and carrying away trees and bark. An examination of the reserved case shows that the writ did not charge the defendant with cutting the trees, as is inadvertently stated in the first paragraph of the opinion of the court. That the defendant peeled the bark is stated in the case, but whether he cut the trees or not does not appear. Whether he did one or both, the plaintiff did not allege either in her declaration, but declared as if the defendant had only broken and entered her close and carried away her personal property found there. No question which was there decided arises in the present case.

The defendant is entitled to a new trial upon the question of damages, but not upon the question of title. *Lisbon v. Lyman*, 49 N. H. 553.

New trial as to damages.

EASTMAN V. HIBBARD.

(54 N. H. 504.)

Bankruptcy — contingent debts — when liability of surety on bond continues after discharge.

In an action against a surety on a bond given to secure the damages and costs occasioned by an injunction, the defendant pleaded his subsequent discharge in bankruptcy. Replication that the suit in which the injunction issued was not determined until after such discharge. *Held*, that the replication was good.

ACTION of debt upon a bond executed by the defendant Morse, who alone answered, as surety, in October, 1866. Morse pleaded in abatement that in June, 1868, he was discharged in bankruptcy.

Replication that: "The plaintiff says that by reason of any thing by

the said defendant Morse in his said plea alleged, he ought not to be barred from having and maintaining his action aforesaid thereof against him, because he says that the obligation in said declaration set forth was given upon the condition following, that is to say: 'The condition of this obligation is such, that whereas the said Elisha Hibbard has obtained an injunction upon the said William Eastman, his attorney or attorneys, and George Morrison, deputy sheriff, and others concerned, against the collection of an execution issued in favor of the said Eastman against the said Hibbard, issued at the September term of the Supreme Judicial Court for said county of Grafton, for two hundred and ninety-nine dollars and seventy-three cents damages, and eighteen dollars and six cents costs: Now, if the said Elisha Hibbard shall pay and satisfy all such damages as may be occasioned to said William Eastman by reason of such injunction, in case the proceedings in which the said injunction is issued shall be determined against the said Elisha Hibbard, then this obligation to be void, otherwise to remain in full force;' that the proceedings in which said injunction was issued were determined against said Hibbard long after the 7th day of January, 1868, in the said defendant's said plea mentioned, and were not before that time determined, to wit, on the 13th day of March, 1873. And this he is ready to verify," etc. To this replication the defendant demurred.

The case was reserved.

Carpenter, for plaintiff.

E. W. Farr, for defendants.

LADD, J. The replication shows that no cause of action accrued to the plaintiff on this bond until more than five years after Morse was adjudged a bankrupt, and almost five years after his final discharge. The question is, whether the liability of the defendant as surety on the bond was discharged by his discharge in bankruptcy.

Section 19 of the bankrupt act of 1867 provides that "in all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained." It was obviously impossible

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for the plaintiff to avail himself of either of these provisions; the contingency did not happen before the order for the final dividend, and there was no basis upon which the present value of the liability could be ascertained and liquidated. Whether any liability, contingent or otherwise, would ever arise upon the bond, could not possibly be ascertained at that time, and was not in fact ascertained till five years afterward. It depended upon whether the proceeding in which the injunction was issued should be determined in favor of Hibbard or this plaintiff. The claim was not provable under the act, and it is not to be presumed that Congress intended a result so manifestly unjust as that it should be barred by the discharge.

Section 19 of the act of 1867 is to the same general purpose as section 5 of the bankrupt act of 1841, and the English act of 6 Geo. 4, c. 16, namely, to provide for the proof of contingent debts and demands. Cases decided under the provisions of those acts may therefore be considered as in point. I will refer particularly to but one—*Woodard v. Herbert*, 24 Me. 358. There a debtor was arrested on *mesne* process, and gave a bond in common form to procure his release from arrest; the surety in the bond then filed his petition, and was decreed to be a bankrupt; next, judgment was rendered in the action, and the bond became forfeited by the neglect of the principal to perform the condition thereof; and afterward the bankrupt received his certificate of discharge. It was held that such certificate furnished no defense to a suit on the bond. SHEPLEY, J., delivering the judgment of the court, says: "It is necessary to distinguish between a contingent demand, and a contingency whether there will ever be a demand. * * In the case of a bond made to release from arrest on *mesne* process, there is no obligation to pay the debt in any event, if one should finally be established. It only obliges the surety to cause the principal to do a personal act, and in case of failure, to make compensation in damages wholly unliquidated and incapable of estimation, before the effect produced by the failure of performance of the personal act can be perceived. It would seem to have been impossible to fix any value upon such a personal obligation. Upon what principles could a court direct a valuation of the chances that the plaintiff would recover judgment, and that the defendant in that suit would neglect to notify and disclose, as the statute requires?" This reasoning is entirely applicable to the present case. *Goodwin v. Stark*, 15 N. H. 218, is much in point, as are also the English cases of *Hinton v. Acraman*, 2 M. G. & S. 367; *Hankin v. Bennett*, 8 W. H. & G. 107; *Parker v. Ince*, 4 H. & N. 53, cited by plaintiff's counsel, and *M'Dougal v. Paton* 8 Taunt. 588.

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We are of opinion that the replication shows a good answer to the plea, and that the demurrer

Must be overruled.

BARKER v. HIBBARD.

(54 N. H. 539.)

Infant — necessities — attorneys' fees.

An infant is liable as for necessities, for services of an attorney rendered in defending him in a bastardy proceeding.

ASSUMPSIT to recover for services rendered by the plaintiff as attorney in defending Hibbard in a bastardy proceeding. The defendant was a minor. The parties agreed that "the services were such as are usually performed in similar cases, and the charges reasonable and just, and the defendant is liable therefor unless he is relieved of such liability on account of his being a minor as aforesaid. If, in the opinion of the whole court, the defendant is liable, judgment is to be rendered for the plaintiff for the amount of his account; if the defendant is not liable, the plaintiff is to become nonsuit."

Barker, pro se, cited *N. H. M. F. Ins. Co. v. Noyes*, 32 N. H. 345; *Phelps v. Worcester*, 11 id. 51; *Clark v. Leslie*, 5 Esp. 28.

Dudley, for defendant, besides cases cited by the plaintiff, cited *Peters v. Fleming*, 6 M. & W. 47; *Burghart v. Angerstein*, 6 C. & P. 698; 1 Bl. Com. 466; 3 Bac. Abr. 593, 594; 3 Steph. N. P. 2053; 1 Am. Lead. Cas. 301, 302.

HIBBARD, J. If the plaintiff is entitled to recover in this action, it is upon the ground that professional services of an attorney, rendered to an infant defendant in a bastardy proceeding, are necessities. A lawsuit may be necessary to an infant: whether it is so or not must be determined by circumstances, as in case of other things claimed to be necessities. *Thrall v. Wright*, 38 Vt. 494. Services rendered by an

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attorney for their protection of an infant's rights of property are not necessities, and the attorney cannot recover for them of the infant, whether he had or had not a guardian. *Phelps v. Worcester*, 11 N. H. 51. "That necessities concern the person and not the estate, furnishes the true test." FOWLER, J., in *N. H. M. F. Ins. Co. v. Noyes*, 32 N. H. 345, 351. But expenses of litigation, incurred in good faith by a guardian on account of his ward, may be allowed in settlement of the guardian's account. *Smith v. Bean*, 8 N. H. 15.

Upon a diligent examination of reported cases, we have found no direct authority on the question whether an infant is liable for services rendered by an attorney in the defense of a bastardy proceeding or a criminal proceeding. But it seems that professional services which it is reasonable for him to have, rendered in defending him in a prosecution for a criminal offense in which his liberty and even his life may be at stake, are necessities for which he ought to be liable. It was, however, decided in *Hill v. Childress*, 10 Yerg. 514, that a father is not liable for the services of an attorney in defending his minor child upon a charge of murder, for the reason that a father is only responsible for necessities furnished to his minor child, "among which the services of an attorney cannot be ranked." But in this State a father would not be liable in such a case, though it were conceded that the plaintiff's services were necessities for his minor child. *Kelley v. Davis*, 49 N. H. 187; S. C., 6 Am. Rep. 499.

Services of an attorney rendered to a wife in prosecuting a libel for divorce against her husband are not necessities (*Morrison v. Holt*, 42 N. H. 478), nor are those rendered in defending a libel of the husband against the wife (*Ray v. Adden*, 50 N. H. 82; S. C., 9 Am. Rep. 175); but if rendered in prosecuting the husband upon the complaint of his wife for a breach of the peace, and necessary for her safety, they are necessities. *Morris v. Palmer*, 39 N. H. 123. If, however, there were no reasonable grounds for instituting the proceedings, the law is otherwise (*Smith v. Davis*, 45 N. H. 566, 570); but if rendered in defending a groundless prosecution, brought by the husband against the wife to compel her to find sureties to keep the peace, they are necessities (*Warner v. Heiden*, 28 Wis. 517; S. C., 9 Am. Rep. 515); and, perhaps, if the prosecution was not groundless the result might be the same. Note to *Warner v. Heiden*, 11 Am. Law Reg. (N. S.) 283.

A strong authority in support of this action is *McCrillis v. Bartlett*, 8 N. H. 569, in which the plaintiff, though not an infant, had been made incapable of entering into an express contract by the filing of a petition for the appointment of a guardian over him; but it was held that "money

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furnished him, and aid rendered him in making a proper defense against such appointment, in a case where there is apparently a reasonable doubt whether a guardian ought to be appointed, may be regarded as a necessary expenditure for which an action or set-off may be sustained upon an implied promise."

A more decisive authority in favor of the present plaintiff is *Minson v. Washband*, 81 Conn. 803. A female infant was seduced and got with child, under a promise of marriage. The seducer afterward refused to marry her, and she was left in a state of destitution and suffering. Thereupon she applied to an attorney to bring suit for her for the breach of the promise of marriage. He did so, and it was afterward settled by the marriage of the parties. After the marriage, the attorney sued the husband and wife for his services. The decision was, that, if the services were necessary for the personal relief, protection and support of the female defendant, the action might be maintained.

Though the object of a bastardy proceeding is to procure pecuniary compensation or security from the putative father, its effect, if he is found chargeable, may be to deprive him of his liberty until such order as the court may make shall be performed. Gen. Stats., ch. 76, §§ 4, 7. If he is found chargeable, and is imprisoned for neglect to obey the order of the court, and is poor and unable to pay such sum or procure such security as may be ordered, his remedy to obtain his discharge from imprisonment, it seems, is not by applying to be admitted to take the oath for the relief of poor debtors, but by application to the court under the Gen Stats., ch. 76, § 10, by whom he may be discharged "at such time and upon such terms as they think expedient." The services of an attorney in thus procuring his release from imprisonment, or in procuring his discharge upon a recognizance pending the proceedings, obviously would be necessities.

It was, however, held, in *Dorrell v. Hastings*, 28 Ind. 478, that money paid to relieve an infant from a military draft to which the law subjects him is not for necessities. But in *Clark v. Leslie*, 5 Esp. 28, Lord ALVANLEY ruled that the money advanced to procure the liberation of an infant from arrest on execution was for necessities. "If the defendant had been in execution," said Lord ALVANLEY, "that is, if at all events the defendant had made himself liable to the debt, and could controvert it, paying that debt, I think, would be necessities." And in *People v. Mullin*, 25 Wend. 698, it is laid down that "an infant imprisoned in a civil suit is entitled to a discharge from imprisonment, on assigning his property in compliance with the provision of the statute; and such assignment is valid," upon the ground that "the relief from imprisonment

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being so highly beneficial to the petitioner, his act in making the assignment must in law be regarded as valid."

An infant has authority to do what he is bound by law to do. *Co. Jitt.* 172, a; Lord MANSFIELD, in *Zouch v. Parsons*, 3 Burr. 1801; PARSONS, C. J., in *Baker v. Lovett*, 6 Mass. 78, 80. He may execute a bond to the complainant to appear and answer to her complaint charging him with being the father of a bastard child, and to abide the order of the court thereon. *Mc Call v. Parker*, 13 Metc. 372. He may execute a bond conditioned to indemnify a town from the support of his bastard child. *People v. Moores*, 4 Den. 518. He may settle with the mother of his bastard child, and execute the instruments necessary in making such settlement. *Gavin v. Burton*, 8 Ind. 70.

We think that it must be held that an infant is liable for the services of his attorney in defending him against a bastardy proceeding. This may, it is true, sometimes subject him to larger liabilities than he would incur by making no defense and procuring his liberty by applying for a discharge from imprisonment after he had been found chargeable; but it is to be presumed that he is innocent until he is proved to be guilty. A bastardy proceeding, though held to be a civil action, can only be sustained upon the ground that the defendant has committed a criminal offense. His good name is at stake as well as his property, if he has any or ever acquires any, for a judgment rendered against him will be valid, whether he is or is not liable to pay his attorney; and, besides, if he is found chargeable, the court may not release him on satisfactory evidence of his inability to comply with the order.

If an infant has property, the law provides for the appointment of a guardian to hold and manage it. If he has property and is without a guardian, it is very easy to procure one to be appointed. There can rarely be occasion for an infant to employ an attorney in suits relating to his property; but if he has no property, the law does not contemplate that he shall have a guardian; and if one should be appointed in such a case, it would be unreasonable to expect him to employ at his own expense an attorney for his ward. If an infant has no authority to pledge his credit to an attorney when arraigned as the putative father of a bastard child, he may sometimes be prevented from getting bail, or from making a successful defense.

We are of the opinion that the consequence of holding that he has such authority are much more likely to be beneficial than prejudicial to his interests. He will only be liable for services and expenses which it was reasonable to render and incur. That his own directions were followed, unless there was reasonable cause to believe it was for his inter-

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est to follow them, will be immaterial. Any express promise he may make to pay exorbitant fees to his attorney will be void. He will only be liable upon an implied promise to pay a reasonable sum. *Reeve's Dom. Rel.* [229] [230]; *Bing. Inf. & Cov.* (2d Am. ed.) 87, note; *Locks v. Smith*, 41 N. H. 346. Charges incurred in making or attempting to make a defense, which there was no good reason to believe it was for the interest of the infant to make, will not be recoverable. *PARKER, C. J.*, in *McOrillis v. Bartlett*, 8 N. H. 569, 572. But according to the agreement of the parties, the services of the plaintiff for the defendant "were such as usually are performed in similar cases, and the charges reasonable and just, and the defendant is liable therefor unless he is relieved of such liability on account of his being a minor." There must therefore be judgment for the plaintiff for the amount of his account.

The conclusion to which we have arrived has not been affected by the circumstance that the defendant, at the time he employed the plaintiff had been emancipated by his father. See *Locks v. Smith*, 41 N. H. 346.

Judgment for the plaintiff.

GARLAND V. TOWNE.

(55 N. H. 55.)

Nuisance—constructing roof so as to project snow and ice into highway.

Declaration that defendant's building abutting a highway was so constructed that the snow and ice may accumulate upon the roof and thence fall into the street, and that it did so fall and injure the plaintiff. *Held*, defective in not charging defendant with negligence.

ACTION on the case. The first count alleged that defendant, on February 4, 1873, owned a house abutting on Elm street, in Manchester, which was so constructed as to obstruct the fall of snow and to accumulate snow and ice and precipitate them upon said Elm street, and that plaintiff while passing along said street, on said date, was injured by said falling snow and ice.

The second count was like the first, except that it contained an allegation that the roof and eaves of the defendant's building project over and into Elm street, and also the following: "And while so passing along and on

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said sidewalk as aforesaid, a large quantity of ice and snow, which had accumulated on the roof of the said defendant's said building, and which the said defendant, though well knowing thereof, had long and negligently suffered to be and remain upon the roof and eaves of the building aforesaid, endangering the life and limbs of those having occasion to pass over and along said street, was precipitated and fell upon the plaintiff, striking her upon the head," etc.

The defendant demurred, generally, to each of the counts of the declaration, and the questions thereon arising were reserved.

Morrison, Stanley & Hiland, for plaintiff.

S. N. Bell, for defendant.

LADD, J. In the trial of this cause, I think it will be for the jury to say whether the injury of which the plaintiff complains was caused by the negligence, that is, the want of due care, on the part of the defendant. I suppose the fact that ice slid from the roof upon the sidewalk on this particular occasion is evidence to be considered on the general question of the defendant's negligence; and I see no reason why the jury might not legally find negligence from that circumstance alone, if unexplained. It was the general duty of the defendant to prevent the sliding of snow and ice from her roof upon the sidewalk; she was bound to guard against such a result by the exercise of due and proper care. When, therefore, the thing she was thus bound to guard against and prevent happened, I should say *res ipsa loquitur*, and if no explanation were offered, the jury might find negligence without other proof. It is much like the recent case of *Kearney v. The London, Brighton, etc., Railway Co.*, Law Rep., 6 Q. B. 759. There, as the plaintiff was passing along a highway under a railway bridge of the defendants, which was a girder bridge resting on a perpendicular brick wall with pilasters, a brick fell from the top of one of the pilasters on which one of the girders rested;—a train had passed just previously. The question was, whether, there being no other evidence of negligence, a verdict for the plaintiff could be allowed to stand; and it was held, that the defendants being bound to use due care in keeping the bridge in proper repair, the falling of the brick was evidence from which the jury might infer negligence in the defendants.

It has been thought that the doctrine laid down in *Rylands v. Fletcher*, Law Rep., 1 Exch. 65, affirmed on error, Law Rep., 3 H. L. 330, is applicable to cases of this sort. In that case the defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening

land ; mines under the site of the reservoir, and under part of the intervening land, had been formerly worked, and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his own colliery and the old workings under the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence ; but, in fact, the reservoir was constructed over five old shafts leading down to the workings. On the reservoir being filled, the water burst down these shafts, and flowed by the underground communication into the plaintiff's mines. *Held*, reversing the judgment of the Court of Exchequer (3 H. & C. 774), that the defendants were liable for the damage so caused.

In the opinion of the court, by BLACKBURN, J., the decision is placed distinctly and emphatically on the ground that one who, for his own purpose, brings upon his land, and collects and keeps there, any thing likely to do mischief if it escapes, is *prima facie* liable for all the damage which is the natural consequence of its escape. Water is, in this respect, put in the same category with beasts wont to rove and do mischief, filth and noxious odors. And the same view was taken by Lord CAIRNS, Chancellor, and Lord CRANWORTH, who delivered opinions in the House of Lords.

I am not aware that any court on this side the Atlantic has gone so far as this ; and I apprehend it would be a surprise, not only to that large class of our people engaged in various manufacturing operations who use water-power to propel their machinery, and for that purpose maintain reservoirs, but to the legal profession, to hold that, in case of the breaking away of such reservoirs, there is no question of care or negligence to be tried, but that he who has thus accumulated water in a "non-natural" state on his own premises is liable, at all events as matter of law, in case it escapes, for the damage caused by it. See *Mayor of New York v. Bailey*, 2 Den. 433. But however that may be, it is to be borne in mind that ice and snow, although the material of which they are composed is water, are, nevertheless, solids, and, as such, are no more liable to escape control, and pass upon the premises of an adjoining proprietor and there do mischief, than any other solid bodies of a similar material construction, that is, of like specific gravity and external form. Water, on the other hand, being a liquid, the particles of which move easily upon each other, is constantly seeking a level, and so exerts a constant force which must be constantly restrained : and all the mischiefs of an inundation are certain to follow the breaking away of the barriers erected for

its control. This is its nature as much as it is the nature of cattle to rove and eat a neighbor's corn, or of filth from a privy to be offensive, or of unwholesome stenches to be diffused, so as to contaminate the air which a neighbor is compelled to breathe.

As a general proposition, it is safe to say that the owner of land has a right to make a reasonable use of his property; and that right extends as well to an unlimited distance above the earth's surface as to an unlimited distance below. He may not only dig for a foundation and a cellar as deep as he pleases, but he may erect his building as high as he pleases, into the air, subject all the time, of course, to a proper application of the doctrine contained in the maxim *sic utere tuo ut alienum non lædas*. The erection and maintenance of buildings for habitation or business is a customary and reasonable use of land. Of course the land-owner, in making such erections, must be held to the exercise of all due care against infringing the legal rights of others to be determined by the nature of the rights and interests to be affected and all the circumstances of each particular case. In this climate where snow is sure to fall in considerable quantities at intervals during a considerable portion of the year, and equally sure in the end to melt and find its way back to the earth in the form of water or ascend into the clouds as vapor, the builder must undoubtedly be held to the exercise of all due and reasonable care against injury to others from the effect of these natural causes, operating according to the known laws of nature, in the situation of things as altered from their natural state and condition by his own acts.

I think this case falls within that class of cases referred to by BRONSON, C. J., in his elaborate and useful opinion in *Radcliff's Executors v. Mayor of Brooklyn*, 4 N. Y. 200, where it is held that a man will not be answerable for the consequences of enjoying his own property in the way such property is usually enjoyed, unless an injury has resulted to another from the want of proper care or skill on his part.

The doctrine is clearly stated in the first head-note to *Rylands v. Fletcher*, as reported, Law Rep., 3 H. L. 330, as follows: "Where the owner of land, without willfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbor, he will not be liable in damages." This is a broad statement of a general legal proposition, and must not be regarded as an expression of opinion upon any specific question of evidence that may arise on the trial of this case.

It is quite possible these views may be found, on careful examination, not to be so much at variance with the recent decisions in Massachusetts in the case of *Shipley v. Fifty Associates*, 101 Mass. 251; S. C., 3 Am.

Rep. 346, and 106 Mass. 194 ; S. C., 8 Am. Rep. 318, as they first appear, although both the learned judges who delivered the opinions of the court gave expression to remarks implying that the doctrine of *Rylands v. Fletcher* may have application in such a case, to which, with very great diffidence, I find myself unable to agree.

If a man must, at all hazards, keep upon his own premises the snow which is arrested in its natural fall to the earth by the roof of his house, it seems to me very inconvenient, not to say absurd, consequences may follow. We all know that in this climate a heavy fall of snow is not unfrequently followed immediately by wind ; and, when that happens, it is a probable if not an inevitable consequence that the snow, which has been arrested in its natural fall, and accumulated on roofs, will be carried off and deposited by the wind in a different place from where it would have finally rested but for the roof ; hence, in very many instances, the act of the land-owner in maintaining his building, concurring with the natural operation of the elements, will cast upon the premises of an adjoining proprietor snow with which, otherwise, such adjoining proprietor would not have been annoyed, incumbered or damaged. I do not see why such a doctrine, if carried to its logical results and strictly applied, would not practically prevent the building of cities. I think the injury which results in such a way, from a customary and reasonable use by the land-owner of his property, he using due care (which would doubtless be a very high degree of care) to guard against damage to his neighbor, does not furnish a legal course of action, but must be regarded as *damnum absque injuria*. I make this remark simply with reference to the supposed application of the doctrine of *Rylands v. Fletcher* to this case ; and I purposely abstain from any extended discussion of the legal questions which may arise in the case, because those questions can be better and more intelligently considered when the actual facts, as shown upon a trial, are before us.

The conclusion I come to is, that the demurrer must be sustained as to the first count, and overruled as to the second.

CUSHING, C. J. The declaration contains two counts. In the first it is alleged that the defendant's building is placed by the side of the highway, and so constructed that the snow and ice may accumulate upon the roof, and from the roof fall into the street ; and it does not allege any negligence or want of due care in the construction or management of the building, and therefore assumes as law, that if, under any circumstances, snow and ice should fall from the roof and injure a passenger in the highway, the defendant would be liable absolutely.

The second count alleges that the roof was constructed so as to overhang the highway, and that, through the negligence of the defendant, the snow and ice fell into the street and injured the plaintiff.

In *Brown v. Kendall*, 6 Cush. 292, SHAW, C. J., says, *arguendo*: "If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom."

"In using this term, 'ordinary care,' it may be proper to state that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger."

"To make an accident, or casualty, or, as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed."

It appears to me that the eminent judge who delivered the opinion in this case has given in these few words a clear and intelligible statement of a principle of law of universal application. In the case of *Brown v. Collins*, 53 N. H. 442, the doctrine laid down by SHAW, C. J., in the case of *Brown v. Kendall*, 6 Cush. 292, and above cited by us, is affirmed and approved after a very elaborate and exhaustive discussion, and must now be taken to be the law of New Hampshire. There may be cases where the very fact that the accident has happened may justly be considered as evidence tending to show neglect.

In the case under discussion, it is not alleged that the defendant, in erecting and maintaining her building, had violated any local statute or by-law of the city of Manchester, nor does it appear that the act of erecting and maintaining the building was unlawful, so that the defendant is not liable unless there has been a want of due care; and the first count of the declaration, which seeks to charge her absolutely, cannot be maintained.

By Gen. Stats., ch. 70, § 11, the erection or continuance of a building upon or over any highway is punishable by indictment and fine, and the building so erected is a nuisance. If, therefore, the building of the defendant is, as alleged in the second count of the plaintiff's declaration, so built as to project over the highway, it is a nuisance, and the maintaining of it an indictable offense. This being so, the injury to the plaintiff would appear to have been produced by the unlawful act of the defendant, and she would be liable without proof of negligence.

FOSTER, C. J., C. C. I agree with my learned brethren that the first count in the plaintiff's declaration cannot be sustained, and that the demurrer thereto must be allowed. The second count not only alleges positive negligence and want of proper care in suffering the snow and ice to accumulate upon her building and to remain there, and moreover, that the building was "so constructed" as to obstruct the fall of snow and ice, and cause it to accumulate thereon, and to cause ice to form on the roof and be precipitated upon the sidewalk below, but it also contains the distinct allegation that "the roof and eaves" of the defendant's building "project over and into Elm street," thus charging the defendant with maintaining a nuisance, in violation of express statutory law. The demurrer to the second count must, therefore, be overruled.

If the allegation of the projection of the eaves and roof over and into the street should be proven on the trial of the cause, the plaintiff will be entitled to a verdict, without any evidence of actual negligence or want of care on the part of the defendant being required.

The existence of the nuisance, and the injury therefrom to a person using ordinary care on his part, are sufficient to sustain an action against the author or maintainer of the nuisance. *Shearman & Redfield on Negligence*, § 363, and authorities cited; *Elliot v. Concord*, 27 N. H. 208.

Independently of this consideration, I am not prepared to hold that the mere fact of the injury to the plaintiff from the falling of the ice from the defendant's roof is any thing more than evidence competent for the consideration of the jury upon the question of the defendant's negligence. I am not prepared to say that it is *prima facie* evidence of negligence, in so far as evidence thus denominated is sometimes said to be sufficient to require the defendant to assume thenceforward the burden of proof, or to rebut any presumption arising from the fact. The fact raises no presumption, nor touches the burden of proof. It is evidence simply, which, with or without other evidence bearing upon the general question of negligence, the jury may consider and weigh.

The general reasoning of my brother LADD, as expressed in his opinion, seems to me logical and sensible. Certainly, it is not opposed to any authority in this State, though its results have not been expressed as settled law.

Demurrer sustained as to first count, and overruled as to second.

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GEE v. CHESHIRE COUNTY MUTUAL FIRE INSURANCE COMPANY.

(55 N. H. 65.)

Insurance — condition against double insurance.

The plaintiff, having a valid insurance in one company conditioned to be void if the assured should have existing during the existence of such policy, any other contract of insurance, whether valid or not, obtained a policy from the defendants upon part of the same property, which was also conditioned against double insurance. *Held*, (1) that the first policy did not terminate instantly upon the execution of the second so as to save the condition in the second, and that there was a double insurance within the terms of the second policy; and (2) *semble* that the condition in the first policy, making it void in case of an "invalid" contract of insurance, was void.*

ACTION of assumpsit upon a policy of insurance issued by the defendant. The following facts were agreed upon.

On the 1st day of January, 1868, the plaintiff, Austin W. Gee, obtained a policy of insurance from The Niagara Fire Insurance Company on his house, barns, furniture, and produce in Marlow, N. H. This policy contained the following proviso: "And provided further, if the assured, or any other person or parties interested, shall have existing, during the continuance of this policy, any other contract or agreement for insurance (whether valid or not) against loss or damage by fire on the property hereby insured, or any part thereof, not consented to by this company in writing, and mentioned in or indorsed upon this policy then this insurance shall be void and of no effect." On August 22, 1870, the plaintiff obtained a policy from the defendants on the same property, and also "on hog-house, 14 by 19 feet, the sum of fifty dollars, and on clothing in said dwelling-house and ell, one hundred dollars." Sec. 10, of the defendants' act of incorporation, is as follows, viz.: "And be it further enacted, that if insurance on any house or building shall be and subsist in said company and in any other office, or from and by any other person or persons, at the same time, the insurance made in and by said company shall be deemed and become void, unless such double insurance subsist with the consent of the directors, signified by indorsement on the back of the policy, signed by the president and secretary." The act of incorporation of the defendants, and the proviso in the first-mentioned policy, are in very fine print, and the clause against double insurance in neither of the policies was known to the plaintiff, who acted in good faith throughout, until the property was destroyed.

* See *Hubbard v. Hartford Fire Ins. Co.*, 11 Am. Rep. 125.

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Wait, for plaintiff.

Wheeler & Faulkner, for defendants.

LADD, J. In *Gale v. The Ins. Co.*, 41 N. H. 170, the plaintiff, having a valid insurance in one company, with a condition against double insurance, obtained a policy in another company which also contained a similar condition; and it was held, in accordance with the general current of authority, that the first policy was not rendered invalid for the reason that the second never had any vitality, and did not constitute any breach of the condition in the first.

In the present case, up to the moment when the form of a contract with the defendants was completed, the plaintiff had a valid contract of insurance with the Niagara company. But now it is said that the idle ceremony of taking out an invalid policy with the defendants was a breach of a condition found in the policy of the Niagara company, not indeed against double insurance, but, if it amounts to any thing, a condition against an attempt to procure double insurance; that thereupon the Niagara policy became void, and therefore the argument is, there was no instant of time when there was a double insurance, and so the defendants' policy is still in full force, notwithstanding their condition. In other words, that the whole force and effect of the law, as settled in this State, as well as in other jurisdictions, is avoided, or, to use a more appropriate expression, evaded, and a policy which otherwise would have been nugatory in its inception, by virtue of an express condition incorporated into it, made valid and of binding force by four words, found inclosed in brackets, in the middle of the condition, finely printed, in the Niagara policy.

I am unable to adopt this view. Doubtless insurance companies may insert conditions in their policies to protect themselves against the mischiefs of double insurance; and, unless such conditions are repugnant to the contract evidenced by the policy, or are for some other legal cause inoperative, effect will be given to them in accordance with the intention of the parties as expressed in the instrument.

The condition in the defendants' policy is the usual condition inserted for this legal and proper purpose; and it seems to me it would be straining a point, as well as introducing a refinement which the law ought not to tolerate, to hold that the Niagara policy did not survive the execution of the defendants' policy so as to render the same invalid, within the fair and sensible construction of that condition. The construction contended for would, as it seems to me, tend to invite rather than discourage

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the introduction into policies of insurance of astute and perplexing conditions, and to promote rather than discountenance the worst kind of rivalry between rival companies to see which should succeed best in protecting themselves in this way against liability in case of loss, at the expense of others at least equally entitled to the equitable consideration of the court, or at the expense of the assured.

I am of opinion that when the plaintiff, without surrendering or in any way canceling or intending to cancel his policy in the Niagara company, procured another policy on the same property from the defendants, there was a double insurance within the fair meaning of the condition in that policy, and that the defendants cannot be held liable for the loss of the property covered by the Niagara policy.

This is as far as it is necessary to go in the present case. But it is not to be understood that I accept the view that the Niagara policy was rendered invalid by the nugatory act of the plaintiff in procuring a policy from the defendants.

The condition under consideration in the Niagara policy, as already remarked, is not against double insurance, nor is it against any specified act on the part of the plaintiff like the obtaining of an invalid policy in some other company; but it is expressed in terms very vague and very general, against the making of an *invalid* contract of insurance. What is an invalid contract of insurance? Obtaining a nugatory policy in some other company has been held over and over again not to constitute any contract at all. It confers no rights on the one hand, and imposes no obligations on the other. It is not a contract, it is a mere nullity. How can that which is not a contract, in any legal or even popular sense of the term, properly be called an invalid contract? Suppose the plaintiff had gone through the form of making a contract with some person who represented that he had authority to act for and bind some insurance company, when, in point of fact, he had no such authority, and in that way obtained a policy which was void by reason of fraud or forgery, or both, on the part of the pretended agent: would that constitute an invalid contract of insurance within the meaning of this condition?

Illustrations and queries of this sort, showing the extraordinary nature of the questions that might arise in the construction of such a condition, need not be multiplied. I only desire to say, that I am not satisfied that the act of the plaintiff brings the case within the terms of the condition, even admitting that the condition is in any view a valid one. But I am not prepared to admit that the condition is a valid one. I do not suppose it would be contended that a condition, that the policy should be void in case the plaintiff did nothing at all, would be a valid condition.

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Most certainly it would be void for repugnance. How does it change the legal aspect of the matter to say that it shall be void if he does an act which, in the eye of the law, amounts to exactly the same thing as though he had done nothing at all? The utmost that can be said of it is, that it is a condition against *an attempt* to procure double insurance; and is it to be held that such a condition is legally consistent with the scope and effect of the contract, as evidenced by the policy? If *an attempt*, resulting in total failure, may be allowed the effect to avoid a policy, why not allow a simple purpose or intention, formed in the mind of the assured but never put into action, the same force whenever such secret purpose can be discovered? I think I should hesitate before coming to the conclusion that a condition, declaring the policy forfeited if the assured makes an abortive attempt to procure double insurance, is so consistent with the contract to which it is annexed that it can be upheld in giving construction to the whole instrument taken together.

It may be said that an invalid contract of insurance, if believed by the assured to be valid, furnishes the same temptation to a fraudulent destruction of the property by him as though it were valid; and that is doubtless true. But the answer is, that this has not heretofore been regarded as a sufficient reason for holding both policies void, as is shown by the case of *Gale v. The Ins. Co.* The supposed double insurance would, of course, be evidence more or less cogent for the jury to consider upon the question whether the assured burnt his own property; but it does not furnish a legal reason why a condition which ought to be held void for repugnancy, on a fair construction of the whole instrument in which it is found, should be declared valid.

If these views be correct, they bring us to the same result already reached by another road; for, if the condition against an invalid contract of insurance contained in the Niagara policy be held in operation, the case stands in all respects like *Gale v. The Ins. Co.*; and there can be no recovery against the defendants, upon the facts stated in the case, except for the hog-house and the clothing, which were not covered by the Niagara policy.

SMITH, J. The question raised in this case was settled in *Gale v. The Ins. Co.*, 41 N. H. 170, which is in conformity with the general current of authorities. It is claimed, however, by the plaintiff, that, inasmuch as the policy of the Niagara company provides that by the existence of any other agreement for insurance, *whether valid or not*, the insurance in that company shall be void, that policy must inevitably be void, and being so void, there is nothing to prevent the validity of the policy

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of the defendant company. Even if the first policy be void for that reason, I do not think that fact will make valid the second. At the time the plaintiff agreed with the defendants for the second policy, he had a valid policy in the Niagara company, and that, by the terms of the defendants' policy, rendered the second policy void. *Jackson v. Massachusetts Ins. Co.*, 28 Pick. 418; *Clark v. New England Ins. Co.*, 6 Cush. 342; *Barrett v. Union Ins. Co.*, 7 id. 179. If, then, the Niagara policy became void, as contended by the plaintiff, as the result of his procuring the second policy, the question arises whether both policies are not void.

I do not think, however, that the provision in the Niagara policy that an *invalid* agreement for insurance shall render that policy void has that effect, for the reasons suggested by my brother LADD, namely, (1) that a nugatory policy constitutes no contract at all — it is a mere nullity; (2) that such a condition is not a valid one, being void for repugnancy, and inconsistent with the scope and effect of the contract.

FOSTER, C. J., C. C. I entirely agree with the views and conclusions of my brethren.

Case discharged.

GILMAN V. LACONIA.

(55 N. H. 130.)

Highway — liability of town to adjoining land-owner.

In an action by the owner of land adjoining a highway against the town, the declaration alleged that the defendant negligently permitted the highway and drains to get out of repair, so that the water which ought to have gone through the drains overflowed plaintiff's land to his damage. *Held*, that the declaration stated a cause of action.

ACTION in the case against the town of Laconia to recover damages to plaintiff's lands, by reason of the negligence of the defendant in permitting an adjoining highway to get out of repair and the drains thereto to become so filled up that the water which should and otherwise would have been carried off through them, overflowed plaintiff's land and damaged it. The defendant demurred.

Barnard, for plaintiff.

Whipple, Jewell & Smith, for defendants.

LADD, J. I think this demurrer must be overruled. The injury to a land-owner, for which compensation is made by the award of damages upon the laying out of a highway, is such as, in the judgment of the selectmen, county commissioners, or jury, as the case may be, will result to him from the construction and maintenance, in a suitable and proper manner, of a road upon the land taken for that purpose, and nothing more. Nor can there be any doubt but that the selectmen or other tribunal, in estimating such damage, must go upon the ground that in building and maintaining the road reasonable care and skill will be exercised, and a just regard be had to the rights of the owner of adjoining land, as well as the owner of land over which the highway passes. It being certain, therefore, that the land-owner receives no compensation in the original award of damages for injury which may be caused him by an improper or unsuitable construction and maintenance of the road, or by a construction and maintenance that have not a proper regard for his rights, the question is whether he can maintain an action at common law against the town to recover such damage.

That he cannot recover against the highway surveyor or other public officer charged by law with the duty of building or repairing the road, provided such officer has acted in good faith and according to the best of his abilities, is well settled (*Waldron v. Berry*, 51 N. H. 136); and the statute only provides for an assessment of additional damages when, in repairing a highway by authority of the town, the grade is raised or lowered, or a ditch made at the side thereof. Gen. Stats., ch. 66, § 20. Unless, therefore, the common law furnishes a remedy against the town when either their act or omission in building or maintaining the road causes damage not covered by the original award, and not of a character contemplated by the statute above referred to, the land-owner is subjected to an injury which may amount to a taking of his land without compensation or redress.

It perhaps might not be difficult to show that this would bring the matter within the constitutional prohibition against the taking of private property for public uses without compensation. See *Eaton v. B. C. & M. R. R.*, 51 N. H. 504. But without stopping to inquire how that may be, I think the rights of the land-owner in such case stand too firmly upon the plainest principles of the common law to require the aid of this provision of the Constitution in their support.

The general duty of building and keeping in repair highways is imposed by statute upon towns (Gen. Stats., chs. 66, 68), and as a

necessary consequence of this duty they have some special rights, amounting to a qualified property, as explained in *Troy v. Cheshire Railroad*, 28 N. H. 83, and *Hooksett v. Amoskeag Co.*, 44 id. 105, in the land over which they pass. Indeed, for all purposes of construction and repair, towns stand in a position which differs in no substantial respect from that of an owner of the fee; their control of the premises is so far absolute and exclusive. This, as it seems to me, obviously imposes upon them a duty toward the owner of adjoining land which, so far as regards the consequences of their acts and omissions in building and repairing, is not to be distinguished from the duty of an ordinary adjoining proprietor of land with respect to the premises of his neighbor. The purpose for which the land has been taken is to build and maintain upon it a road for the use and accommodation of the public. To build and maintain such road in a suitable and proper manner must of course always be held a reasonable use of the land, because this is the use to which it has been condemned; and no damage however great arising therefrom can give a cause of action, because all such damage must be presumed to have been included in the original award. But when it comes to the matter of an unsuitable and improper construction, or of a wanton or negligent disregard of the rights of the land-owner in maintaining the highway, I see no reason why the maxim *sic utere*, etc., should not apply. To hold otherwise would, as it seems to me, be not only gross injustice, but a palpable violation of legal principles that are quite fundamental and elementary.

I have not reached this conclusion without a careful examination of *Ball v. Winchester*, 32 N. H. 435. The main doctrine there laid down was, that a town is not liable for damage occasioned by the acts of a surveyor of highways, within the scope of his authority, except where such liability is imposed by statute, and he is not to be considered the agent of the town in making repairs upon highways within the town, so as to charge the town for damage occasioned by his illegal acts.

It is not necessary in the present case to inquire into the soundness of this proposition, although I must say I have never been able to comprehend the reasons upon which it rests. The burden of building and maintaining their highways is cast upon towns absolutely by the statute. In the performance of that duty they may elect surveyors if they choose, and as many as they think proper (Gen. Stats., ch. 66, § 5); or they may, if they prefer, authorize the selectmen to procure the work to be by contract. *Ib.*, § 25. If they adopt the former course, as is doubtless the usual practice, the duties and powers of the officers they thus create are pointed out and defined by statute, the same as are the duties of the

selectmen and other officers of the town. Why are not highway surveyors officers of the town? They are chosen by the town or appointed by the selectmen: the whole business of their office is to expend and apply the money and labor of the inhabitants of the town in and about the performance of a duty imposed in express and stringent terms upon the town, and no one else. How does the business of building and repairing a road become any less the business of the town because its oversight is placed in the hands of an officer appointed by the town, but whose duties and powers are prescribed by law? Did the legislature intend to make the town liable in any case for the act or omission of a public officer who is not the officer, agent, or servant of the town? If so, I can but regard the law as an anomaly of absurdity and injustice. The case of *Hardy v. Keene*, 52 N. H. 370, will illustrate what I mean. That case was tried before me at *nisi prius*, and I undertook to apply to the facts the doctrine of *Ball v. Winchester*. The derrick was erected by the highway surveyor in the forenoon. It fell, injuring the plaintiff, about four o'clock in the afternoon of the same day, by reason (as was claimed) of the negligence of the surveyor in securing its fastenings.

But, according to *Ball v. Winchester*, the surveyor was not the agent of the town, and the town was not liable for his act in thus rendering the highway insufficient and dangerous. The town, upon the authority of a series of well-considered decisions in this State, could only be held liable in case the injury was caused by a defect which they ought to have discovered and remedied before the accident.

The court, by a decision in which I did not participate, but with which, upon this point, I fully agree, held that the surveyor was to be regarded as the agent of the town for the purpose of notice of insufficiency of his own act in securing the derrick. The facts stated in the case show that upon no other ground could the town have been held liable, as they afterward were, for the insufficiency of the fastening, for the fastening was of such a character that it could only be known to those who did the work, and the fact was only *proved* by the disastrous event.

It is not easy to see upon what ground it can be held that the town is not liable for the negligence and illegal acts of the surveyor in the discharge of his legal duty, and at the same time, that notice to that officer of the character of those acts or omissions is notice to the town, sufficient to lay the foundation for a recovery against the town on the ground of fault in not remedying the defect resulting from such acts or omissions of the surveyor. The substance of the thing certainly seems to me too plain to be concealed, namely, that the town is held liable directly for the

fault of the surveyor; and if that is so, it must be on the ground that the surveyor is the officer, agent, or servant of the town.

But as already remarked, this question does not arise in the present case. There are, however, some observations of the learned judge who delivered the opinion of the court in *Ball v. Winchester*, with which my conclusions in the present case are not consistent. He says (p. 443): "Assuming that the town may be held to answer for special damage resulting from their neglect of duty, at the suit of the party injured, what is the duty which, according to the allegations of the first and third counts, the defendants have been guilty of neglecting? It is there alleged that they suffered and permitted the channel of the stream running along by the highway, and the culvert by which it was conducted across to the river, to become filled and choked up, so that the water was thereby turned upon the plaintiff's premises. This contains no averment of a breach of duty. It does not amount to an allegation that the town suffered the highway to become insufficient and out of repair. Indeed, all may be true, as alleged in these counts, and yet the highway be in proper condition and repair for the purposes of travel upon it. But considering it, as it has been considered in the argument, as equivalent to an allegation that it was insufficient and out of repair, still it is the duty of towns to keep their highways in suitable repair only for the travel passing thereon, and it is only to the traveler, as such, that the duty can be said to be owing."

It would be with greater diffidence that I should venture to express my dissent from the views which I understand these remarks to embody, had not the same court, composed of the same judges, given a decision three years afterward, which, if I apprehend it rightly, is entirely the other way. I refer to the case of *Groton v. Haynes*, 36 N. H. 388. That was an action on the case by the town of Groton against the defendant for digging a ditch across a highway which the town was bound to keep in repair. It was shown by the evidence that the highway in question was laid out by the selectmen of the town in 1841; that forty years or more before the act complained of, the person under whom the defendant claimed opened a ditch, extending from his dwelling-house across the place where the highway now is to a brook, for the purpose of conveying water from the brook to his house and barn, and that the water had from that time to the present generally run in this ditch; that when the highway was first built, a culvert was put in to provide a passage for the water. In 1855, this culvert having got out of repair so that the water did not run through it, the defendant called on the highway surveyor to clear it out, etc., which he refused to do. Thereupon the defendant

cleared it out himself, and turned the water from the brook into the ditch, and thus conveyed it to his house, for his own use, leaving the culvert open.

It was contended by the plaintiffs that the defendant had no right to a passage for his water-course, or, in other words, that the town had a right to stop the water-course, discontinue the culvert, and make a solid road-bed across the channel. This was denied by the court. The doctrine of the case is thus stated in the head-note: If the owner of land over which a highway is laid out have on the land an artificial water-course, used to convey water to his house, the road ought to be constructed and maintained with a culvert or other suitable passage for the water-course, unless the difficulty and expense of providing such a passage would exceed the damage of stopping the water-course, and make it unreasonable to require the road to be so constructed and maintained. In delivering the opinion of the court, PERLEY, C. J., says (p. 394): The defendant, then, had a right to a suitable culvert to convey the water in this water-course across the road, and it was the duty of the town to provide and maintain it for him; and when the culvert was filled up and stopped, by neglect of that duty, it was a nuisance, which caused the defendant a private and individual damage; and, on general principles, he had a right to remove it himself, in a proper manner, doing no unnecessary damage.

It is manifest that this case can be sustained upon no other ground than that the town owe a duty to the land-owner as well as to the traveler and the public. Of course it cannot be pretended that an act or omission in building or maintaining a road might constitute a private nuisance which the person aggrieved would have a right to enter and abate, and at the same time that he could have no action to recover the damages occasioned him thereby. If, therefore, the decision in *Ball v. Winchester* rests at all on the proposition that the towns owe no duties in respect of their highways except to the traveler as such, I think the case is so far clearly overruled by *Groton v. Haines* and cannot be regarded as the law.

The doctrine of this opinion is thoroughly established in Massachusetts (*Perry v. Worcester*, 6 Gray, 544; *Parker v. Lowell*, 11 id. 353; *Sprague v. Worcester*, 18 id. 193; *Emery v. Lowell*, 104 Mass. 15); also in Vermont, in *Haynes v. Burlington*, 38 Vt. 350, where may be found a very clear and forcible opinion by POLAND, C. J.; see, also, *New York v. Furze*, 8 Hill, 612; *Stone v. Augusta*, 46 Me. 127. An extremely elaborate and satisfactory discussion of the English cases by BLAUKEBURN, J., may be found in *The Mersey Docks Trustees v. Gibbs*, Law Rep., 1 H. L. 93; see, also, a very full and careful examination of many cases bearing more or less directly on the subject, by SMITH, J., in *Baton v. B. C. & M. R. R.*, 51 N. H. 504.

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The rule to be observed in the assessment of damages is quite another matter, and is not before us. But the fact that great care and circumspection will be necessary to discriminate between such damage as must be held to have been compensated by the original award, and such as forms the legal basis of a recovery in a suit like this, makes no difference with the legal principle to be applied in deciding upon the demurrer.

CUSHING, C. J. The subject of the duties and liabilities of municipal corporations, as applied to towns in this State, was discussed in *Ball v. Winchester*, 32 N. H. 435; *Eastman v. Meredith*, 36 id. 284, and *Groton v. Haines*, id. 388.

In *Ball v. Winchester*, the complaint was that a highway surveyor had raised an embankment for the purpose of turning the water into a culvert which he had placed across the highway; that the culvert being too small, the water ran over the embankment so that it ran down, united with other water, and ran further down to an older culvert which the town had permitted to become stopped up, and there, for want of a sufficient culvert, had flowed back and flooded the plaintiff's warehouse.

Here were in point of fact two causes of the injury, an embankment and insufficient culvert, alleged to have been improperly erected by the surveyor, and another culvert permitted to become stopped by the negligence of the town.

These two causes of action were described in the declaration, that of the embankment being described in the second count, and the obstructed culvert in the first and third counts, and the allegation in each count was for permitting the highway to become defective and out of repair. The court held that the plaintiff could not recover on either of his counts, in order to which, as I understand it, it was necessary to hold not only that the town could not be made liable for the negligence of the surveyor, but, also, in regard to its keeping its highways in repair, the town owed no duty excepting that imposed upon it by statute in favor of those persons who had occasion to use the highway; and it was held that the plaintiff could not recover. The doctrine was broadly stated that ordinarily a town owed no duties except those imposed upon it by statute.

It should be noticed that in this case the cause of action stated was negligence in suffering the highway to be out of repair, and not the erecting and maintaining a nuisance.

In *Eastman v. Meredith* the same general doctrine was maintained, and the plaintiff there failed in his action, it being held by the court that even admitting the public duty of the town to furnish a town-hall for the

holding of town-meetings, still, the statute had imposed no duty in regard to private individuals which could be the subject-matter of an action.

In the course of his opinion, however, the learned chief justice alluded to and perhaps recognized a class of cases in which municipal corporations, by reason of their ownership of property from which they derived a profit, or of being allowed some privilege, assumed or were subjected to certain liabilities in regard to private persons.

He also alluded to another class of cases in which a municipal corporation might perform its recognized duties in such way as either by negligence or otherwise to invade the rights of individuals, and so become liable to an action at common law. In the course of his opinion, he says: "In several of the cases cited for the plaintiff, cities and towns have been held liable for private injuries done by them in the course of executing works which they were by law authorized to perform. In *Scott v. The Mayor and Aldermen of Manchester*, 37 Law and Eq. 495, by the carelessness of workmen whom the defendants employed in laying gas-pipes, a piece of metal was thrown into the plaintiff's eye, and the city was held to be liable. So, in *Delmonico v. The Mayor, etc., of New York*, 1 Sanford, 222, an action was maintained for damage suffered by the plaintiff from the negligence of the defendants in the process of constructing a sewer. The remarks of the court in *Anthony v. Adams*, 1 Metc. 285, are to the point, that an action may be maintained against a town in such a case."

And further on he says: "So if a town or city maintain an erection or structure which is a private nuisance, and causes a special damage, or, in the performance of an authorized act, invade any right of property, the corporation has been held liable to a civil action. *Thayer v. Boston*, 19 Pick 511; *Akron v. McComb*, 18 Ohio, 229; *Rhodes v. Cleveland*, 10 id. 159. If the defendants in the present case had laid and maintained the foundations of their town-house across a stream, and caused the water to flow back on the plaintiff's land, according to those authorities, they would have been liable to an action for the damage."

I do not understand that the learned chief justice intimates any disapprobation of this doctrine.

In the case of *Groton v. Haines*, 36 N. H. 388, the same court, the same learned judge delivering the opinion, held that a town has no right, in the execution of its duty in building and maintaining a highway, unnecessarily to obstruct a water-course, to the damage of riparian owners. He says in the course of his opinion: "The defendant, then, had a right to a suitable culvert to convey the water in this water-course across the road, and it was the duty of the town, or the officers of the town, to pro-

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vide and maintain it for him; and when the culvert was filled up and stopped by neglect of that duty, it was a nuisance, which caused the plaintiff a private and individual damage, and, on general principles, he had a right to remove it himself, in a proper manner, doing no unnecessary damage. No complaint is made that he proceeded without due notice. He called on the surveyor to do his duty, which he neglected."

The cause of action, therefore, which is the subject of complaint in the plaintiff's writ, is, according to this authority, a nuisance, which the plaintiff might lawfully abate, and for which, according to the authorities cited by PERLEY, C. J., in *Eastman v. Meredith*, and apparently with approbation, an action at common law may be maintained.

The action, however, would technically be case for erecting and maintaining a nuisance, and not an action for negligence in suffering a highway to be defective.

Considered in this point of view, the judgment in *Ball v. Winchester* was perhaps technically correct, the action not being case for maintaining a nuisance, but case for negligently permitting the highway to be defective and out of repair, although the broad doctrine laid down in that case seems hardly consistent with the case of *Groton v. Haines*. I am therefore of opinion, that, both on sound principle and the doctrine of *Eastman v. Meredith* and *Groton v. Haines*, and cases cited, this action may be maintained, although it may be technically necessary for the plaintiff to amend his declaration.

SMITH, J. In *Wheeler v. Troy*, 20 N. H. 77, it was held that towns, for neglect to keep in repair the highways within their limits, are liable at common law and independently of the statute giving an action to the party injured. But in *Eastman v. Meredith*, 36 N. H. 800, the correctness of the decision in *Wheeler v. Troy* was questioned, and the court expressed themselves as feeling at liberty to reverse it, but were not called upon at that time to do so. The doctrine of *Farnum v. Concord*, 2 N. H. 392, however, was reaffirmed, where it was held that no action lies at common law against a town for damages sustained through defects in highways.

In *Ball v. Winchester*, 32 N. H. 442, occurs the following language: "The position is taken that the damages sustained by the plaintiff have resulted from the neglect of the town to perform a duty imposed upon them by law, and that for damage happening in consequence of such neglect of duty, the suffering party may have his remedy against the town independent of any statute provision to that effect. We are not prepared to say that there exists any sound reason for distinguishing, in

the application of that principle, between the case of a town or other corporation aggregate, occasioning special damage by the neglect of a duty expressly imposed upon them, if the duty be of such a character that it may properly be considered as one owing to the party suffering from the neglect, and that of an individual occasioning such damage by a like neglect."

The principle upon which *Groton v. Haines*, 36 N. H. 388, was decided, is consistent with the suggestion raised in the above quotation from *Ball v. Winchester*.

In the later case, of *Eaton v. B. C. & M. R. R.*, 51 N. H. 504, is an able and exhaustive opinion by JEREMIAH SMITH, J., upon the subject of damages caused by municipal and other public corporations to the property of another, where it is said "that the decisions, which go to the length of exempting municipalities from liability for the infliction of injury upon the land of another, are erroneous in principle. If in the repair of highways there is a physical interference with land outside the limits of the highway, a substantial taking away of the soil of the adjacent owner, or an imposition of foreign substances upon it, so as to amount to a substantial abridgement of his right of exclusive user, the mere fact that the injury is done by a town or city ought not to deprive the land-owner of all redress. The opposite view 'places individual property * * at the mercy of municipal power.' 'We can solve more easily and safely questions of this character if we take pains to free our minds from the false notion that a municipality has some indefinable element of sovereign power, which takes from the property of the citizen, as against its aggressions, the protection enjoyed against the aggressions of a natural person.' The same constitutional provision that protects the right of private property against invasion by private individuals, 'must protect it from similar aggression on the part of municipal corporations.'"

To the same effect are the later decisions in Massachusetts (see *Perry v. Worcester*, 6 Gray, 544), where it was held that "where damage is necessarily done to the property of an individual by taking his land for a highway when authorized by public authority for public use, all damage necessarily incident to such work is regarded as contemplated when the land is so appropriated, and no action therefor will lie. Such works are legally regarded as warranted by the public in the exercise of eminent domain, and are not unlawful. But," said SHAW, C. J., "this presupposes that the public work thus authorized will be executed in a reasonable, proper, and skillful manner, with a just regard to the rights of private owners of estates. If done otherwise, the damage is

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not necessarily incident to the accomplishment of the public object, but the improper and unskillful manner of doing it. Such damage to private property is not warranted by the authority under color of which it is done, and is not justifiable under it. It is unlawful and a wrong, for the redress of which an action of tort will lie." See, also, *Sprague v. Worcester*, 13 Gray, 193, and *Merrifield v. Worcester*, 110 Mass. 216, and authorities cited.

However this principle may be regarded as having been settled in the earlier cases in this State and in Massachusetts, by the later decisions in the latter State a municipal corporation is held liable to the person suffering damage, whether from the improper construction or the improper state of repairs of its highways, not using them as such; while the cases of *Wheeler v. Troy*, *Groton v. Haines*, and *Eaton v. Railroad*, in our own State, recognize the same doctrine. In *Wheeler v. Troy*, Judge GILCHRIST remarks as follows: "These facts are adverted to as having a tendency to show that by immemorial custom, and independently of any statute that has been preserved, the towns in this State have been held liable to keep in repair the highways within their limits, and that for neglect of that duty common-law remedies, both of a public and a private character, have existed, and those of a public character, at least, put in force from a very early period. * * We are inclined, therefore, to the opinion that the general maxim of the common law, that he who is specially damaged by the breach of a duty on the part of another shall have his remedy by action, is properly applicable to the case of one who has received an injury through the neglect of a town to repair its roads."

Whether this action can be maintained depends upon the question whether the defendants' care and management of the highway was reasonable and proper under the circumstances.

Demurrer overruled.

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(55 N. H. 141.)

Removal of suit — when may be had.

An action by the citizen of a State against a foreign corporation cannot be removed into the United States Circuit Court under the Revised Statutes after one trial has been had, although the action is one where review will lie

ACTION of review of an action of assumpsit upon a policy of insurance issued by the defendant, a corporation of Connecticut. The original action was tried before a jury. The exceptions taken on the trial were overruled by the Supreme Court and judgment rendered for the plaintiff. The defendant thereupon sued out his writ of review, and afterward at this time filed their petition for a removal of the cause into the Circuit Court.

Mugridge and Pike & Blodgett, for plaintiff in review.

Whipple and Barnard, for defendant in review.

SMITH, J. This is a petition to remove this cause to the Circuit Court of the United States for the district of New Hampshire, under the act of Congress, passed March 2, 1877 (as claimed by the petitioner). The enactment of the Revised Statutes of the United States, which were approved June 22, 1874, operated to repeal the judiciary act of 1789, and the acts of 1866 and 1867 regulating the removal of actions from a State to a Federal court. Under the act of 1866 an action within its provisions might be removed into the Circuit Court of the United States upon petition filed "at any time before the trial or final hearing of the cause." Under the act of 1867 an action within its provisions might be removed into the Circuit Court of the United States upon petition filed "at any time before the final hearing or trial of the suit." The difference between these two acts in this respect is marked and distinct.

We have been cited by the plaintiffs in review to the case of *Insurance Company v. Dunn*, 19 Wall. 214, decided October term, 1873, in the Supreme Court of the United States, which their counsel claims is an authority directly in point in favor of granting this petition. That would be so, provided there has been no change in the statute in the particular above noticed. It becomes important then to inquire whether Congress, in enacting the Revised Statutes, has made any change in this respect.

Section 639 contains the provisions of the judiciary act of 1789, and of the acts of 1866 and 1867, relating to the removal of actions from the State to the Federal courts. In examining to ascertain whether the act of 1867 has been changed in the particular above mentioned, we look to the corresponding portion of said section, which is the *third* clause, from which it appears that Congress in revising the laws has made its legislation uniform in this respect. It provides that a petition

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for removal may be filed "at any time before the trial or final hearing of the suit," adopting the same language that was used in the act of 1866, and to which it still adhered in re-enacting that act in the *second* clause of said section.

It is apparent to my mind that this change was not the result of accident, but was deliberately made to secure uniformity upon the subject, in view of the conflicting decisions between the Federal and State courts upon this question. *Akerly v. Vilas*, 1 Abb. (U. S.) 284; S. C., 24 Wis. 165; 1 Am. Rep. 166; *Johnson v. Monell*, Woolworth, 390; *Insurance Company v. Dunn*, 19 Wall. 214; *Bryant v. Rich*, 106 Mass. 192; S. C., 8 Am. Rep. 311.

In *Insurance Co. v. Dunn*, 19 Wall., Judge SWAYNE says, p. 226: "In the act of Congress of 1866, the language used in this connection is 'at any time before the trial or final hearing.' If the difference in the act of 1867 be material, it is fair to presume that the change was deliberately made to obviate doubts that might possibly have arisen under the former act, and to make the latter more comprehensive." That that court considered that there was a substantial difference in the language of the acts of 1866 and 1867 further appears from the second head-note to the case, which reads thus: "The language above quoted, 'at any time before the final hearing or trial of the suit,' of the act of March 2, 1867, is not of the same import as the language of the act of July 27, 1866, on the same general subject, 'at any time before the trial or final hearing.' On the contrary, the word 'final,' in the first-mentioned act, must be taken to apply to the word 'trial' as well as to the word 'hearing.' Accordingly, although a removal was made after a trial on the merits, a verdict, a motion for a new trial made and refused, and a judgment on the verdict, yet it having been so made in a State where by statute the party could still demand, as of right, a second trial, *held*, that such first trial was not a 'final trial' within the meaning of the act of Congress, the party seeking to remove the case having demanded and having got leave to have a second trial under the said statute of the State."

In *Bryant v. Rich*, *supra*, GRAY, J., in delivering the opinion of the court, said: "The words 'before final hearing' in the act of Congress of 1867 would seem to be equivalent in meaning to the same words—'trial or final hearing'—as transposed in the similar act of 1866, ch. 288; and it is at least doubtful whether a party who has once taken the chance of a decision upon the merits by a trial before the jury in an action at law, or a hearing before the court in a suit in equity, in the State court, can, if the case stands open for a new trial or further hear-

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ing, remove it into another tribunal. It has been decided by the Supreme Court of Wisconsin, in a very able judgment, that he could not. *Akerly v. Vilas*, 24 Wis. 165."

The requirement of the present statute then is, that the petition must be filed before "the trial or final hearing in the suit," and not as formerly "before the final hearing or trial of the suit." That this does not mean "final trial" is, I think, clear from the change that was made in the revision of the laws, and seems to be authorized by the stress which is put upon the difference in the language of the acts of 1866 and 1867 by the Supreme Court in *Insurance Company v. Dunn*, *supra*.

The parties in this case have had a trial by jury. The original plaintiff recovered a verdict; the exceptions of the defendant were overruled by the full bench, and judgment for the plaintiff was entered upon the verdict. This judgment cannot be reversed or otherwise affected by a judgment in review. The petitioner's counsel very truly says in his brief: "It remains, whatever the result of the review, and the party in whose favor it was rendered retains whatever he obtained by it: unless reversed by error it must ever stand as the final determination and conclusion of the suit which preceded it. *Badger v. Gilmore*, 37 N. H. 459; *Andrews v. Foster*, 42 id. 379; *Pike v. Pike*, 24 id. 397. Such a trial answers fully the meaning of the term, as used in section 639 of the Revised Statutes. In limiting the time when a petition for removal must be filed to a period prior to such trial, Congress must be deemed to have intended that the party who may prevail upon such trial in the State court should not be deprived of the fruits of the trial and of the judgment rendered therein at the pleasure of the discontented party.

It is questionable whether the Constitution could have been adopted if it had been understood that it conferred on Congress the power to pass an act removing an action from a State to a Federal court. In *Wetherbee v. Johnson*, 14 Mass. 412, it is said that it has been held in the Supreme Court of Virginia "that it never was the intention of the Constitution of the United States to consider the Supreme Courts of the several States as tribunals inferior to the courts of the United States; or that a privilege was given to a defendant who had submitted to the jurisdiction of a State court, taken his trial there, and finally failed in his defense, to harass his adversary by intercepting the remedy which he may have obtained at great expense, and carrying his cause to a tribunal whose sessions would be at the seat of the national government, perhaps a thousand miles distant from the place of his residence."

The decision is, perhaps, only valuable as showing the understanding of those who lived in the time of the early history of the republic.

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There are many very strong reasons why, after the parties have submitted to one trial in a State court, the cause should not be removed to another jurisdiction. If it is not "a dangerous interference with the independence of State tribunals," it tends "to vex and harass the citizen by a multitude of trials, the last of which would be remote from his place of residence, where it would be always difficult and sometimes impossible for him to prove the facts upon which his cause depended; besides which it infringes one of the most ancient and cherished principles of the common law, that the trial of facts should be in the vicinage where they happened." *Wetherbee v. Johnson, supra*, 420.

The result of my conclusions is, that the statutes of the United States do not authorize the removal of this cause to the Circuit Court of the United States for this district. The petition therefore should be denied.

LADD, J. I think this petition should be denied. There has been a trial of the cause upon its merits in the State court, and a final and irreversible judgment rendered therein. Availing themselves of a right conferred by a statute of this State, the defendants have brought a review; and the cause may now be tried over again here, in accordance with the provisions of the statute, which imposes various qualifications and conditions upon the exercise of the right. Gen. Stats., ch. 215, §§ 10, 11, 12, 13. Unless the cause is to be tried and judgment to be rendered in the Federal court on review, the same as though it had not been tried before at all (which I suppose nobody will pretend), I do not see how it can be tried there at all, unless the Federal court will undertake to administer the municipal law of New Hampshire, and communicate with the State court for the purpose of ascertaining what the final judgment there shall be. But even if this difficulty were out of the way, it seems to me the reasons against the construction of the United States statute contended for by the plaintiff in review are quite strong and controlling. Undoubtedly the language of a legislative act ought to be very clear and unequivocal, before a court would be warranted in holding that the legislature intended to give parties the right to experiment in a State court by going through with a full trial of the merits there, and then, if they are not satisfied with the result, carry their cause to another court for a retrial of the same issues of fact already once settled by the verdict of a jury to which they have voluntarily submitted them. Practically it would amount to an appeal, and make the State courts inferior to any Federal court now in existence, or which may be hereafter created, to which it shall be provided that such cause may be removed. The right to a retrial in the State court is given by a statute of the State, but that statute confers no jurisdiction upon any other tribunal. I fully

agree with my brother SMITH, that the language of this act admits of no such construction.

Further : If such a construction were to be put upon the act, I should say that in its spirit and practical operation it is in direct conflict with the seventh article of amendment of the Constitution of the United States, which declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." *Wetherbee v. Johnson*, 14 Mass. 412; *Bryant v. Rich*, 106 id. 180; S. C., 8 Am. Rep. 311, and cases cited on page 193. By the rules of the common law, facts once settled by the verdict of a jury cannot be tried again by another jury in the same proceeding.

The merits of this question have been recently considered by the Supreme Judicial Court of Massachusetts in the case of *Galpin v. Critchlow*, 112 Mass. 339, see 17 Am. Rep. 176, where, after a careful examination of the various acts of Congress, relating to the subject, it was decided that an action cannot be removed from a State court into the Circuit Court of the United States under the act of Congress of 1867, ch. 196, after a trial on the merits, although such trial resulted in a disagreement of the jury. With entire respect it may be said that, so far as regards the reasons upon which the question should be determined, no higher authority can be produced, and I fully agree with the reasoning of the learned chief justice in that case, and with the conclusion reached by the court. The question, however, whether the language of the act of 1867 is equivalent to that used in the act of 1866 need not be discussed because of the change of phraseology made by the Revised Statutes.

Nor is it necessary to inquire how far the case of *Insurance Co. v. Dunn*, 19 Wall. 214, could be regarded as an authority in favor of the plaintiff's contention had no such change in phraseology been made.

In view of the provisions of our statute with respect to reviews, and the amendment of the United States Constitution referred to, as now advised, I should hesitate before ordering a cause removed to the Circuit Court of the United States for review, in pursuance of any statute that might be passed by Congress, until such right of removal had been determined by the Supreme Court of the United States upon error to the judgment of this court.

CUSHING, C. J., concurred.

Exceptions overruled and petition denied.

Stevens v. Gage.

STEVENS v. GAGE.

(55 N. H. 175.)

Administrator — liability of, for moneys stolen.

Money belonging to the intestate's estate was stolen from the administrator without his fault. *Held*, that he should be discharged as to such money on the settlement of his account.

APPEAL from a decree of a judge of probate settling the accounts of Gage as administrator with the will annexed of the estate of Andrew Stevens. The only matter in controversy was the sum of \$498.94 belonging to the estate which the auditor found was stolen from defendant's safe by burglars, without his fault or negligence.

Sargent & Chase, for appellant.

Butler, for appellee.

LADD, J. "It is said that there is a difference in the rule, as applied to executors in a court of law and a court of equity. Thus, in a court of law, an executor will be charged with all the assets that come to his hands to be administered, and he must discharge himself by showing a legal administration of all of them; and he cannot discharge himself at law by showing that he intrusted them to another in the ordinary course of business; that he used due caution and prudence, and reposed a reasonable confidence in such other person; and that the assets were lost without negligence or default on his part. Such a state of facts would not sustain a plea of *plene administravit* in a court of law; but a court of equity would adjust the account of an executor upon equitable principles. A court of probate in taking the account would also act upon equitable principles." Perry on Trusts, § 407, citing *Crosse v. Smith*, 7 East, 246; *Jones v. Lewis*, 2 Ves. Sr. 241; *Poole v. Munday*, 103 Mass. 174, and *Upson v. Badeau*, 3 Bradf. Sur. 13.

In *Jones v. Lewis*, the defendant, an administrator, delivered goods, for which she was liable to account, to a solicitor, who was robbed of them, and it was held that she was not to be charged for the goods so lost. Lord HARDWICKE said: "It is certain that if a bailee of goods, against whom there is an action of account at law, loses the goods by robbery, that is a discharge in an action of account at law, and it is proved (and I think reasonably) that if a trustee is robbed, that robbery properly proved shall be a discharge, provided he keeps them so as he

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would his own. So it is as to an executor or administrator, who is not to be charged further than goods come to his hands; * * and if robbed, and he could not avoid it, he is not to be charged, at least, in this court. How it would be in a court of law I know not, for I know no case of that at law. The defendant is administratrix: supposing these goods had been in her own custody and she had been robbed, I am clearly of opinion, if that fact be made out, she ought to have been discharged of these goods. * * In the present case, what has been done is what she would have done with her own, leaving them with her solicitor in order to be delivered to the plaintiff when proper to do so; and why might she not do that? * * It would be too hard to charge her with these things lost." See, also, *Bacon v. Bacon*, 5 Ves. 331.

It is not contended on behalf of the appellant but that the liability of this administrator for the money belonging to the estate, stolen from him under the circumstances shown by the auditor's report, depends upon whether or not he exercised due care in keeping it; but the claim is that he did not exercise such care, and that the money was lost through his negligence. It appears that he took the same care of this money as he took of his own. Ordinarily I should not be inclined to regard that as a conclusive test of due care on the part of an administrator. But the significance of that fact is very considerably increased, as it seems to me, by the circumstance that the appellant recommended the appointment of Mr. Gage as administrator with the will annexed; for where one voluntarily makes another his bailee, there is much reason in saying that he thereby signifies his confidence in the known personal character of such bailee, and his willingness to accept from him the same degree of care and prudence in keeping the thing intrusted to him as he uses in the care of his own goods of the same kind.

But without placing my decision on that ground alone, and without intending to relax the rule which should doubtless hold administrators to the exercise of all due and reasonable care with respect to funds which come to their hands in the course of administration, I am of opinion that Mr. Gage ought not to be held upon the facts stated in the auditor's report. The money was deposited in an iron safe designed and intended to keep its contents in security, as well against thieves and burglars as against fire; and although such places for the deposit of valuables have been broken into and their contents stolen with startling frequency for the past few years, yet it must be admitted that the number thus invaded bears a very small proportion to the whole number in use during the same period of time. I am, upon the whole, inclined to hold that when Mr. Gage deposited this money in the safe, under all the

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circumstances shown by the report, he exercised with respect to it that degree of care which ought to be regarded as due care, and that he was, therefore, rightly discharged as to the amount stolen, on the settlement of his administration account in the Probate Court.

CUSHING, C. J. I understand that the appellant rests his case on the charge that the appellee did not exercise due care. I think that in this State the rule in regard to specific articles is as stated by my brother LADD.

As to the matter of due care, I find it difficult to imagine any course which would have been more reasonable.

As to the suggestion that the funds might have been specially deposited in a savings bank, or other bank, it does not appear to me that such a course would have been any better. If the safes of the banks are more modern and difficult to break, so they are more apt to be attacked, because the prize of success is so much greater. I believe that the proportion of private safes plundered, compared with the whole number, is much less than that of bank safes. I cannot, therefore, see in the facts reported any sufficient reason for charging the appellant with want of due care.

SMITH, J. I should be slow to assent to any decision in this case that would tend to relax the rule which should govern an administrator in the care and preservation of property, especially money that may come to his hands in that capacity. He is held to the exercise of due care. The question is, whether this appellee exercised due care in the custody of the funds of this estate. By the report of the auditor, it appears that he had, on the 18th of April, 1869, \$498.94 belonging to this estate deposited in the safe of his firm in Fisherville; that the office of the firm was broken into in the night-time of that day, the safe blown open with powder, and this money, with other money and securities belonging to the appellee and his firm and others, was stolen therefrom: that the safe was a good one is shown by the fact that the burglars who entered it were obliged to resort to the use of gunpowder. It is reasonable to conclude that the lock was one that could not be easily picked. The appellee and his partners and other business men placed their own money and securities in it for safe-keeping. The money might not have been lost if placed in a bank, but there was then no bank nearer than Concord, seven miles distant. The money might not have been lost if the appellee had carried it in his pocket, but no prudent man would think of carrying large sums of money in his pocket, to say nothing of the in-

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convenience of so doing. Where, then, could the appellee have kept this money with greater apparent safety? His administration account shows that he was frequently receiving and paying out money on account of this estate, and held this money to be paid to creditors on call.

I am satisfied that in this case the administrator exercised due care, and therefore should be credited with the loss in his account. *Jones v. Lewis*, 2 Ves. Sr. 241, cited by my brother LADD, is a case which seems to be directly in point.

Decree of the Probate Court affirmed.

COPP V. HENNIKER.

(55 N. H. 179.)

Constitutional law — trial by jury — compulsory reference.

A statute authorized courts, without the consent of parties, to commit any cause to a referee for trial, and provided that after such trial, the cause should, at the request of either party, be tried by a jury, and that upon such trial the report of the referee should be evidence of all the facts stated therein, subject to be impeached by either party. *Held*, that the act was constitutional so far as it authorized a compulsory reference; but *quære* as to the provision making the referee's report admissible.

ACTION against the town of Henniker to recover for injuries caused by defects in a highway. The case was ordered to be referred according to the provision of section 13, chapter 97, of the act of 1874, which reads as follows:

"The Superior or Circuit Court, or any justice thereof, at the trial term, shall commit to one or more referees, to be appointed by such court or justice, any cause pending in such court which may be by law triable by a jury, or the determination of any question of fact which is not by law triable by a jury, or any cause which may require an extended examination of accounts, books or vouchers, which for any reason cannot be conveniently tried by a jury or in court, unless it shall be made to appear to such court or justice that it is inexpedient to make such reference. Said referee or referees may hold sessions for the trial of any cause committed to him or them at such time and place as may be convenient, under the direction of the court by which the cause was referred. Said referee or referees shall proceed in all cases, unless the parties otherwise agree, according to the rules of law or of equity, as the case may be, and according to the practice in court, and shall report his or their decision as soon as may be to the court by which the cause was referred, stating specifically his or their rulings upon all questions of law, and stating all matters of fact found proved by him or them if either

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party shall request. All reports of said referee shall be revised or recommitted by the court to which the same may be returned, or judgment may be rendered thereon, which judgment shall be final and conclusive. In all cases referred without the consent of the parties, where in they are by law entitled to a trial by jury, the same may, at the request of either party, be tried by jury after the report of the referee has been made, in the same manner and with the same limitations as in the case of the report of an auditor; and upon such trial by jury, said report shall be evidence of all the facts stated therein, subject to be impeached by either party. Such referee or referees shall be paid for their services and expenses in each cause such compensation as may be allowed by the court, and the court may direct the same, or any part thereof, to be paid by the county in which the cause is pending, or to be taxed in favor of either party as part of the taxable costs in the cause."

Defendant excepted to the order on the ground that the act was unconstitutional.

Tappan & Albin, for defendant.

Sanborn & Clark, for plaintiff.

LADD, J. [After reviewing the history of trial by jury in New Hampshire.] II. Taking this case, then, as one in which the parties have constitutional right to trial by jury, the question is, whether any provision of the 13th section of chapter 97, Laws of 1874, infringes the constitutional right.

A compulsory arbitration under that section is not the jury trial guaranteed by the Constitution. And this is distinctly admitted in that section, for it provides what shall be done when the parties are entitled to a trial by jury.

Though the legislature may, by not enacting any laws establishing courts, juries, or other tribunals, whose existence depends upon statutes, leave the people without trial by jury, or any judicial tribunal, trial, process, or remedy, they cannot make a constitutional jury of less than twelve men. 41 N. H. 550; 1 Bennett & Heard's Ld. C. C. 482, 2d ed. The reason of this is clearly given in 41 N. H. 550; and the views of our court, as expressed in that opinion, are also strongly set forth in *Work v. The State*, 2 Ohio St. 299, where the court say: "The institution of the jury referred to in our Constitution * * is precisely the same in every substantial respect as that recognized by the great charter, and its benefits secured to the freemen of England, again and again

acknowledged in fundamental compacts as the great safeguard of life, liberty, and property; the same brought to this continent by our forefathers, and perseveringly claimed as their birthright in every contest with arbitrary power, and finally, an invasion of its privileges prominently assigned as one of the causes which was to justify them in the eyes of mankind in waging the contest which resulted in independence. Nor did their affection for it diminish or cool. They made it a corner-stone in erecting the State governments. * * Our opinion is, that the essential and distinguishing features of the trial by jury, as known at the common law, and generally if not universally adopted in this country, were intended to be preserved; * * that it is beyond the power of the "legislature" "to impair the right or materially change its character."

"The language of the Constitution is to be understood in the sense in which it was used at the time of its adoption; and as, at that time, both by the common law and by the settled usage here, the right of voting for public officers was a right that must be exercised personally by the voter at the meeting held for that purpose," it was held that the right of suffrage, established by the Constitution, could not be exercised by proxy. 44 N. H. 635.

"The trial by jury, secured to the subject by the Constitution, is a trial according to the course of the common law, and the same in substance as that which was in use when the Constitution was framed." *East Kingston v. Towle*, 48 N. H. 64. And a trial by a jury of eleven men, or a trial in which the verdict is given by the agreement of eleven out of twelve jurors, would not be a trial by jury in the constitutional sense. 41 N. H. 550; 2 Story on Const., § 1779, n. 2; Sedgwick on Stat. and Const. Law, 493 n. 2d ed.; Cooley's Const. Lim. 319; *State v. Peterson*, 41 Vt. 522; 27 id. 359. A statute might be passed calling eleven men a jury, and declaring that a jury should consist of eleven men and no more, or that, if eleven out of twelve jurors could agree, they might return a verdict; but such a statute would be an infringement of the constitutional right of trial by jury, because such a trial must be "according to the course of the common law, and the same in substance as that which was in use when the Constitution was framed;" and a trial by a jury of eleven men, or a trial with the verdict given by eleven men out of twelve, would not be a trial "according to the course of the common law," and would not be "the same in substance as that which was in use when the Constitution was framed." So much is settled, and so much is so elementary that there could be no difference of opinion about it, if there were no authorities on the subject. As to the general principle that the legislature may adopt regulations giving security to a constitu-

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tional right, and facilitating the exercise of it, there can be no doubt of controversy. *Davis v. School District*, 44 N. H. 398 ; *Copen v. Foster*, 12 Pick. 490. It is equally certain that they cannot, under pretense of regulating, injuriously limit or restrain it.

In 25 N. H. 537, is an opinion of the court, given in answer to a resolution of the senate requesting their opinion as to the constitutionality of a bill then pending before the senate. The court say (pp. 540, 541) : "The bill designs to subject a party appealing from a judgment of conviction by a justice of the peace to a double penalty, or to an increased penalty, if judgment be rendered against him in the court above. * * Unless the right of appeal can be wholly taken away, and the party deprived of all right to a jury trial by closing the only path by which it can be reached, this provision cannot be supported." The increase, *i. e.*, the amount added to the penalty, would be a penalty imposed upon the party as a punishment for his claiming and exercising his constitutional right of trial by jury. "A law which should declare it a crime to exercise any fundamental right of the Constitution, as the right of suffrage or the free exercise of religious worship, would infringe an express rule of the system." *Wynehamer v. People*, 13 N. Y. 419.

If the legislature should say : "Trial by jury is a useless, expensive, inconvenient, and bad institution ; and, for the purpose of deterring parties from claiming their constitutional right to it, be it enacted, that all actions shall be brought before a justice of the peace, or referred by the court to an arbitrator ; and any party claiming a trial by jury shall be liable to a certain penalty to be recovered in a *quasi tam* action," or "shall pay certain costs," or "shall have an increased judgment rendered against him unless he prevails," or "shall give security for costs, or debt, or judgment," or shall in any way be subjected to any expense, liability, inconvenience, or disadvantage, before, after, or during the trial by jury, no one would suppose that a statute, thus expressly declaring its unconstitutional purpose of discouraging, obstructing, hindering, and preventing the exercise of a constitutional right, could be sustained. And if the statute, instead of expressly declaring its unconstitutional purpose, were silent on that subject, or, if it expressly declared that its purpose was to secure and facilitate the constitutional right, its silence, or its explicit averment in relation to its purpose, would by no means be conclusive on that point. If the burden or disadvantage imposed could have no operation or effect except to prevent, hinder, obstruct, or discourage the exercise of the constitutional right, it would operate as a penalty upon the party claiming that right, and would of course be an infringement of the right itself.

The opinion of this court, reported in 25 N. H. 540, 541, is supported by the decision in *Greene v. Briggs*, 1 Curtis' C. C. 311, 327, 328, where Judge CURTIS (and Judge PITMAN) held a statute unconstitutional which imposed an increased penalty upon the party appealing from a justice of the peace, on the ground that the additional penalty operated as and could be considered nothing but a penalty inflicted upon a party for exercising his constitutional right of claiming a trial by jury. "It is manifest," says Judge CURTIS, "that this right is not secured by the Constitution, but is wholly under the control of the legislative power, if it can annex penalties to the exercise of the right." To the same effect is *State v. Gurney*, 37 Me. 156, 163, 164.

There is a class of cases, which might, at first sight, seem to constitute a modification of these principles, but which, as a slight examination will show, fall within the general rule.

The general doctrine already quoted as laid down in *East Kingston v. Towle*, 48 N. H. 64, is well stated by Mr. Pomeroy, in a note in the 2d ed. of Sedgwick on Stat. and Const. Law, 487, thus: "It is the *right* of trial by jury which exists and is preserved; and what that right is, is a purely historical question, a fact to be ascertained like any other social, legal, or political fact. As a Constitution speaks from the time of its adoption, the fact of the right to jury trial, which is ascertained to have existed at that time, must necessarily determine the meaning of the clause which recognizes and preserves the right. The courts seem, with great unanimity, to have accepted this general principle of construction." It is useless to quote authorities at length in support of a proposition on which the entire legal profession of the country are agreed.

There are, in certain cases, various statutory provisions with which parties must comply in order to obtain a jury trial, and which are valid because their requirements were incidents of the historical right which the Constitution adopted and guaranteed. "There shall be paid by the plaintiff or appellant, for the trial of every action by jury, before the trial, to the clerk, for the use of the county, to be taxed in the bill of costs of the party paying the same, five dollars." Gen. Stats., ch. 272, § 22. On what ground is this statute constitutional? Why is not a jury fee a penalty imposed upon the party for claiming his constitutional right of jury trial? The history of previous legislation shows that the "appellants," who are required by our General Statutes to pay jury fees, are the appellants in civil cases only. Suppose the legislature should enact that in criminal cases of indictment, any party demanding a jury trial should pay a jury fee, and on his failing to do so should be tried by the court or a referee, such a

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statute would doubtless be held to be an infringement of the right of trial by jury: but on what ground would it be so held? How could it be held that a jury fee is constitutional in a civil case, and unconstitutional in a criminal one? The Constitution, in express terms, says nothing about a jury fee in either case, and there is nothing in its terms from which any distinction can be implied between a jury fee in civil and a jury fee in such criminal cases. In those civil cases in which trial by jury is a constitutional right, that right is as sacred as it is in criminal cases. Its sacredness is not a matter of degree: it is absolute. The question is, What is the sacred right? and that is "a purely historical question." The right is the historical right enjoyed at the time it was guaranteed by the Constitution. "The trial by jury, secured * * by the Constitution, is * * the same in substance as that which was in use when the Constitution was framed" (*East Kingston v. Towle*); and the trial by jury, in use when the Constitution was framed, and for a long time before, as well as ever since, was one in which a jury fee was required in civil and not in criminal cases of indictment. 3 Prov. Pap. 183, 184, 214, 215; Prov. Laws (ed. 1771), 85, 86, 168; act of April 9, 1777, for continuing in force the general system of provincial law (p. 160, ed. of 1789); act of January 16, 1787, in amendment of the acts establishing fees (p. 91, ed. of 1789); act of February 9, 1791, regulating process and trials in civil causes, sec. 10 (p. 90, ed. of 1797); act of February 9, 1791, regulating fees (p. 119, ed. 1797); act of February 16, 1791, sec. 7 (ed. of 1797, p. 129); act of December 16, 1796 (p. 462, ed. of 1797); act of December 10, 1800, secs. 1 and 2 (p. 109, ed. of 1805); act of December 23, 1820 (p. 320, ed. of 1830); Rev. Stats., ch. 229, § 21; Mass. Anc. Ch. 144; Plymouth Colony Laws, 35, 263. In 1791, the sheriff was entitled to seventeen pence for every trial to be paid with jurors' fees (ed. 1797, p. 116). By the New Hampshire act of 1698, the crier was entitled to fees for a trial (3 Prov. Pap. 215) which were probably paid by the plaintiff, as the sheriff's trial fees were by later statutes.

A jury fee has no tendency to secure the constitutional right of jury trial, nor to facilitate its exercise, either in civil or criminal cases. Why would it be an unconstitutional burden, hindrance, and obstruction in criminal cases of indictment, and not so in civil cases? Because in civil cases, being an incident, a burden appurtenant to the right of jury trial in use when the Constitution was framed, it is an incident, a burden appurtenant to the right of jury trial adopted and secured by the Constitution in civil cases; and in criminal cases of indictment, not being a burden attached to the jury trial in use when the Constitution was

framed, it is not a burden attached to the jury trial adopted and secured by the Constitution in such cases. This is a perfectly satisfactory application of the historical rule of interpretation; and I do not now see any other rule of interpretation on which a jury fee can be held constitutional in civil cases, and unconstitutional in criminal cases of indictment.

It is evident that very difficult questions might be raised by an increase of the jury fee. Suppose the legislature should, from this time forward, annually increase the jury fee to the extent of one dollar or ten dollars; on what ground could a jury fee of six dollars be held unconstitutional? on what ground could a jury fee of ten thousand dollars be held constitutional? One limit might be the actual compensation of the jury in each particular case; another might be their reasonable compensation. Would there be any other limit? Clearly there would be. One other limit would be the amount which could not be exceeded without impairing the right to a jury trial, in substance, the same as that of 1792. Contrasting the compensation of jurors and the jury fee of 1792, and previous years, with the present compensation and fee, and considering the changed value of money, and all the circumstances affecting the practical pecuniary view of the subject, the question would be, whether the present fee was a burden materially greater than the burden attached to the jury trial in use in and before 1792. If it were a materially greater burden, it would be an infringement of the constitutional right; if it were not a materially greater burden, it would not be an infringement of the right. (If I rightly understand the statutes and the practice, the jury trial of 1792 was one in which the jury were paid for their travel by the county, and for the trial of each case, a small fee by the plaintiff or appellant. The system of the jury being paid at all by the public is a recent innovation in England.) The difficulty of applying this historical rule of construction, in case of statutes increasing the compensation of jurors and the jury fee to be paid by the parties, would be chiefly, if not wholly, in investigating certain facts of history and monetary affairs, and not in any matter of legal principle. And if it be objected that the difficulty of deciding by the historical rule of interpretation might be considerable, it is for the objector to answer this question: By what other rule of interpretation can the difficulties in the question of the constitutionality of an indefinitely increased jury fee be resolved at all?

The historical rule answers other questions in relation to burdens incident to the right of jury trial. In criminal cases, a person appealing from the judgment of a justice of the peace must enter into recognizance, with sufficient sureties, in a reasonable sum, not exceeding \$100, for his appearance at the Court of Appeal, to prosecute his appeal with effect, to

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abide the order of the court thereon, and to be of good behavior in the meantime, if so required. Gen. Stats., ch. 240, §§ 2, 3. The accused cannot appeal, cannot obtain a jury trial without entering into such a recognizance. *State v. White*, 41 N. H. 194. Why is not such a recognizance, especially so far as it relates to his good behavior, an obstruction put in the way of his exercising his constitutional right? Why is he not constitutionally entitled to a jury trial, upon being detained in custody until the time for such trial arrives? Because, in such cases the jury trial of 1792 was one of which such a recognizance was an incident. Act of 1718, §§ 3, 4 (Laws of 1771, pp. 69, 70) (by this act the appellant was required to pay the clerk's fee for entering the appeal, to pay the jurors their fees, and generally to do what an appellant must do in a civil case); acts of July 5, 1776, and April 9, 1777, continuing former laws in force (ed. of 1789, pp. 34, 161); judiciary act of Feb. 9, 1791, § 4 (ed. of 1797, p. 53); *People v. Kennedy*, 2 Parker's Cr. Rep 312, 320; see, also, upon this point, *State v. Everett*, 14 Minn. 439; *State v. Peterson*, 41 Vt. 504, 523; *Saco v. Wentworth*, 37 Me. 165, 174; *Saco v. Woodsum*, 39 id. 258; *Green v. Briggs*, 1 Curtis, C. C. 327, 333, 334; *Sullivan v. Adams*, 3 Gray, 476; *Littlefield v. Peckham*, 1 R. I. 500, 509.

I have looked in vain for any satisfactory authority which lays down any other conclusive test of the constitutionality of a burden affixed to the right of jury trial than this: if, with the burden, the trial remains, in substance, the same as the jury trial of 1792, the burden is constitutional; otherwise, not. Other formulas may answer some purposes; other rules, of an introductory or superficial character, may be useful; but the essential, paramount, primary and final test, in my judgment, must be the historical substance of the jury trial of 1792. With that test the solution of some questions of this kind may be difficult; without it, the solution of every one of them is impossible. I entirely agree with Mr. Pomeroy, when he says that "the ultimate test and limit of the constitutional guaranty is to be found in a historical fact" (Sedgwick on Stat. & Const. Law, 488, n., 2d ed.); and that historical fact is the substance of the jury trial of 1792. A statute regulation that impairs that substance is unreasonable and unconstitutional; a regulation that leaves that substance unimpaired cannot be held by the court to be unreasonable, in the sense of being an infringement of the constitutional right. By what standard, except the historical substance of the right, can the constitutional reasonableness of a statute regulation of the right be judged?

The exercise of the right may be regulated by legislation: without
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some legislative regulation of it, or provision for it, it cannot be enjoyed at all. The Constitution merely guarantees the right, and leaves to the legislature the duty of providing the means and methods by which it is to be enjoyed. The time and place of the trial, the qualifications of jurors, and the manner in which twelve shall be selected for the trial of a case, including all the steps from the *venire* to the challenge, are subjects of legislation, subject to the limitation that the substance of the jury trial of 1792 is preserved, and other constitutional restrictions. *State v. Wilson*, 48 N. H. 398; *Com. v. Dorsey*, 103 Mass. 412; *United States v. Morris*, 1 Curtis' C. C. 23, 37; *Stokes v. People*, 53 N. Y. 164; 1 B. & H. Ld. C. C. 495, 496, 2d ed.; Sedgwick on Stat. & Const. Law, 493, n., 2d ed.

There are cases which hold that the right is not impaired by statutes requiring a party to file an affidavit that he believes he has a good case. *Hunt v. Lucas*, 99 Mass. 404; *Biddle v. Com.*, 13 S. & R. 405, 410; *Flint R. S. Co. v. Foster*, 5 Ga. 194; *contra*, 2 Greenl. 255.

There are some cases which seem to disregard the standard of the substance of the right of the jury trial in use at the time that right was continued and guaranteed by the Constitution, and which afford striking illustrations of the necessity of that standard, and for that reason are of no little value.

M'Donald v. Schell, 6 S. & R. 240, arose under the Pennsylvania statute of 1810 authorizing compulsory arbitration, and requiring the party appealing from the arbitrator's award to pay his adversary's costs as a condition of appeal. The arbitrator filed an award in favor of the defendant. The plaintiff made an affidavit that he was unable, within the time allowed by law for an appeal, to raise a sufficient sum to pay the bill of costs. The plaintiff argued that to deny an appeal until the payment of costs, which frequently amounted to enormous sums, and to embarrass it with conditions with which a poor man could not comply, effectually deprived him of a trial by jury. The court, declining to hear any argument on the other side, held the statute valid, saying: "The case * * is hardly open to argument, because the court have heretofore decided that an appeal, under the act * * in question, cannot be entered without payment of costs. The law may, undoubtedly, in certain cases, bear so hard on a poor man as almost to deprive him of his appeal. But that will not justify the court in deciding that the law is void. All general laws operate with severity in particular instances."

This decision is a mere statement of the fact that the question had been previously decided. The ground of the previous decision is not alluded to: what it was, when the decision was made, and in what case,

I am not informed. If the fact was, that in that class of cases, or in all cases, payment of his adversary's costs was an incident of a party's right of jury trial in 1792 (the date of the Constitution), the decision was obviously right. If the fact was otherwise, I cannot see on what ground the decision can be sustained; for the payment of such costs would be a penalty imposed upon the party for demanding his right; and such a penalty is a manifest infringement of the right, an alteration of its substance. The penal character of the condition would not have been more apparent if the statute had expressly declared that the object of the condition was, to obstruct and prevent the exercise of the right. The plaintiff's argument seems to have led the court into the error of supposing that the objection to the provision requiring payment of the adversary's costs is, that a poor man might, in consequence of his inability to pay them, be deprived of a jury trial; whereas the real objection is, that the payment of costs, or any thing else required as a penalty for claiming the constitutional right, infringes the right by operating to obstruct its exercise. The constitutional character of the penal obstruction is not affected by the circumstance that the obstruction may be overcome by a rich man, or may not be overcome by a poor man. It is invalid because it is in law, a penal barrier, and not because, in the path of the poor, it may, in fact, be insurmountable. The facts in *M'Donald v. Schell* did indeed present a case of hardship, and put the penal character of the obstruction in an odious light; and, in 1836, the legislature provided for cases of poverty, by enacting that the party, not being the one who took out the rule of compulsory reference, or being unable to pay the costs, might be allowed by the court to appeal without payment. Purdon's Digest Laws (Penn.), 56, 9th ed.

But such legislation is calculated to obscure the constitutional view of the subject, by propagating the idea that a penalty may be imposed upon the exercise of a constitutional right, if the right can possibly be exercised in the impaired and mangled condition to which the penalty reduces it. And the remark of the court in *M'Donald v. Schell*, that "all general laws operate with severity in particular cases," seems to show that the real nature of the question was not comprehended. A man may be too infirm to go to the court-house, and too poor to employ an agent to attend to his business there; and for these reasons he may be unable to enjoy his constitutional right of trial by jury. Such disabilities are not violations of that right. But if the legislature imposes the payment of his adversary's costs, or any expense or difficulty not an incident of the jury trial in use when the Constitution adopted and continued that mode of trial,—if the burden is imposed not as a necessary means of ex-

exercising the right of that trial substantially as it was exercised at that time,—the burden is an unconstitutional penalty, and not the mere misfortune of a general law operating with severity in particular cases.

In *Keddie v. Moore*, 2 Murphy (N. C.), 41, it was claimed that the right of trial by jury in cases appealed from a justice (whose jurisdiction had been enlarged), was not preserved for the poor who could not give security for an appeal. This position was not sustained by the court, who said (p. 45): "So long as the trial by jury is preserved through an appeal, the preliminary mode of obtaining it may be varied at the will and pleasure of the legislature. The party wishing to appeal may be subjected to some inconvenience in getting security; but this inconvenience does not in this, nor in any other case where security is required, amount to a denial of right." The court here evidently speak of "trial by jury," not as the substance of the particular jury trial in use when the Constitution was adopted, but as a trial which might, in some general and loose sense, be called a jury trial, without regard to the historical rule of interpretation; and the decision, that any inconvenient variation of the historical jury trial of the Constitution does not amount to a denial of the constitutional right so long as a jury trial in some indeterminate sense is preserved, is an obvious abolition of the Constitution.

In *Vanrant v. Waddle*, 2 Yerg. 260, 264, the court say that it had been held that statutes increasing the jurisdiction of justices of the peace, and allowing appeals so that a defendant could not have a jury trial without giving security for the debt, were not unconstitutional.

Flint River Steamboat Co. v. Foster, 5 Ga. 194, arose under the Georgia statute of 1841, which gave persons employed on any steamboat, on certain rivers, a lien on the boat, to be summarily enforced without a jury trial, unless the owner or manager of the boat pay so much of the claim as he admits to be due, file an affidavit denying that the rest is due, and give bond and good security in the county where the proceedings are had, in double the amount claimed, conditioned for the payment of debt and costs. It was claimed that the right of trial by jury was so clogged by these restrictions as to be virtually denied. But the court held the statute constitutional, saying (p. 208): "We cannot think the trial by jury substantially defeated by these conditions, though the defendant may, and at times probably will be subjected to some inconvenience in complying. These terms may be onerous, but this is purely a question of expediency, and one which must, from its very nature, address itself exclusively to the law-maker. And it is difficult to prescribe limits to the power of the legislature in this respect. * * There is no invasion or infringement of the Constitution, so long as trial by jury is not directly

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or indirectly abolished. I repeat, it is impossible to say at what point the legislature ought to stop; and if undertaken to be said by the court, it must be at some point of great excess, that such a stand can be made." The court then go on to suggest that it might be well to amend the statute so as to allow the defendant a jury trial if he would make affidavit that he is unable, from poverty, to comply with its terms, as if the only objection to an obstruction placed in the way of the exercise of the constitutional right were not its legal character as an obstruction, but the fact that some poor and friendless person might find it impassable, a doctrine alike destructive of the inviolable rights of all classes of men, a doctrine that is nothing less than this: we lawfully violate any constitutional right of the poor and the rich to such an extent as barely leaves it in their power, by the expenditure of their property, to enjoy their violated right.

The decision ignores the historical test, and treats the constitutional jury trial, not as a definite and specific institution, perfectly developed, absolutely fixed, and in actual operation at the date of the Constitution, but as an unorganized, unformed, undefined, nebulous, and chaotic generality, that cannot be infringed so long as any thing remains that, for any fanciful reasons violating the truth of constitutional history, may be called a jury trial. Acting upon this theory, the court, of course, found it "impossible to say at what point the legislature ought to stop," and could only declare that, if the court should undertake to withstand an invasion of jury trial, "it must be at some point of great excess that such a stand can be made." That is the position to which we are necessarily reduced, if we abandon the historical test. The legislature may violate the Constitution a little; they may violate it considerably; they may violate it a great deal; but if they carry the violation "to some point of great excess," then it will be for the court to consider whether that is a point at which "a stand can be made." When any court undertakes to make a stand on that theory, we shall have an opportunity to learn by what legal rules the locality of "some point of great excess" is to be ascertained.

These four cases present the unsound doctrine in so palpable a form as to make them exceedingly valuable. The first three of them received scarcely any consideration, and they were all decided before the subject had been much discussed in any part of the country, and without the aid of the great light now afforded by the other authorities (to which I have referred), which establish the law in a manner precluding all controversy about the general principles involved.

In the application of these settled principles to particular cases, diff-

cult questions may arise, as well as in the administration of any other branch of the law of the land. A statute might be of such a character as to raise a great doubt whether its operation would infringe the right to the substance of the jury trial of 1792, or leave that right unimpaired; whether it would obstruct or facilitate the exercise of that right; whether it would be a penalty or a regulation. But in the cases thus far examined there seems to be no difficulty. If, in a class of criminal cases, at the date of the Constitution, a defendant was entitled to a jury trial upon his complying with the single condition of remaining in custody or giving security for his appearance merely as he might elect, his constitutional right would be infringed by such a material alteration of the terms on which he can enjoy the right, as making his enjoyment of it depend upon his paying a jury fee, or the costs of the prosecution, or giving security for his appearance without the option of remaining in custody, or giving security for any thing else than his appearance, or incurring the risk of increased punishment, or submitting to any thing else that would operate as a penalty for the exercise of the right. If, in a class of civil cases, at the date of the Constitution, a defendant was entitled to a jury trial, without giving security for the judgment that might be recovered against him, or paying such part of the claim as he admitted to be due, his constitutional right would be impaired by requiring him to give such security, or to pay what he admitted to be due, as a condition of enjoying his right. His property might be attached and held as security for the judgment, unless he would give security; but a denial of a jury trial, except upon condition of giving security, would be a penalty, and a change in the substance of the jury trial of 1792.

In regard to the general doctrines established by all the cases to which I have referred, I do not suppose there can be any doubt in the mind of any member of the legal profession in this State, or of any citizen who has given the subject any consideration. Upon principle and authority, these doctrines are altogether too clear and elementary to admit of any difference of opinion as to their theoretical soundness. If they are sound, the constitutional guaranty of trial by jury puts a plain limitation upon legislative power; if they are unsound, the constitutional guaranty is a myth. Can these doctrines be practically applied and enforced? Upon that question depends the result of the issue whether we have a Constitution or whether we have not.

Applying the settled principles of constitutional construction to the provisions of section 13 of the act of 1874, which authorize the court, without the consent of the parties, to commit such a case as this to one or more

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referees, to be appointed by the court for a trial, I do not see any infringement of the constitutional right of trial by jury. I see no constitutional objection to a compulsory arbitration that has no other effect than to force upon the parties an opportunity to try their case before some other tribunal than a jury. Such an arbitration may be called compulsory; but it is, in fact, nothing more than an effort to adjust a controversy in a court of reconciliation, which, by hearing the parties "at such time and place as may be convenient," and by otherwise conforming to their convenience in a manner impracticable for the more unwieldy tribunal of a court and jury, may be useful to them, whether the proceeding turns out to be satisfactory and therefore final, or unsatisfactory and therefore preliminary.

The authorities are entirely decisive that such a proceeding is not an infringement of the constitutional right of jury trial, if a reasonably unfettered right of appeal is allowed to a court where the constitutional right in its entirety can be enjoyed. *Plimpton v. Somerset*, 33 Vt. 283, 293; *State v. Peterson*, 41 id. 504, 522, 523, and authorities cited in Sedg. on Stat. and Const. Law, 491, n., 497, 2d ed.; Cooley's Const. Lim. 410, n., 2d ed.; 1 B. & H. Ld. C. C. 493, 2d ed. Whether any other part of section 13 be held valid or void, so much of it as authorizes the sending of this case to a referee being open to no constitutional objection, and being so distinct and independent that the legislature might well have seen cause to enact it without reference to the validity of any other part of the same section, should, in my opinion, be held valid. 41 N. H. 554, 555; *East Kingston v. Towle*, 48 id. 57, 65; *State v. Copeland*, 3 R. I. 33, 36; *Fisher v. McGirr*, 1 Gray, 1; *Com. v. Clapp*, 5 id. 100; *Com. v. Hitchings*, id. 482, 485, 486; *Lincoln v. Smith*, 27 Vt. 328, 355; *State v. Gurney*, 37 Me. 156, 162, 164; Cooley's Const. Lim. 177-181; Sedgwick on Stat. and Const. Law, 413, note a.

Further than this it is not necessary for the court to go in the decision of the question now presented by the bill of exceptions in this case. The only exception now before us is to an order that the action be referred. It does not yet appear whether either party will be dissatisfied with the referee's report; whether, if the case is ever tried by a jury either party will offer the report in evidence, or whether either party will object to its admission.

Whenever a question as to the admissibility and effect of a referee's report in a jury trial is raised, it will be the right of the party raising it to be heard, and not to be precluded by a premature decision made in a case where it is not necessary to make it. As a general rule, a court will not pass upon a constitutional question, unless a decision of it is

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necessary to the determination of the question presented. Cooley's Const. Lim. 163.

[The learned judge then considered at length "as an individual member of the court" the constitutionality of the provision as to the admissibility of the referee's report in a jury trial, but as the question was not involved his arguments are omitted.]

CUSHING, C. J. I concur in what I understand to be necessary for the decision of the cause, viz., that that part of section 13, chapter 97 of the act of 1874, which provides for committing certain causes to referees for trial, is not in conflict with any part of the Constitution of the State of New Hampshire.

SMITH, J. I concur in the result reached by my brother LADD, and in the views which he has so fully presented.

Exceptions overruled.

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(55 N. H. 287.)

Lien — on personal property — when mortgagor cannot create as against mortgages — agistment.

The statute provided that any person to whom cattle were intrusted to be pastured should have a lien thereon for their keep. *Held*, that an agister, to whom cattle had been intrusted by the mortgagor of them without the knowledge or consent of the mortgagee, had no lien on them as against the latter.

TROVER for two horses. The horses were the property of one Robinson, who mortgaged them to the defendant's assignor. Afterward and while the horses were still in the possession of Robinson he had them boarded by plaintiff. While they were thus in plaintiff's possession as agister, the defendant seized and took them under his mortgage. Plaintiff claimed a lien on them for their keep. The horses were in plaintiff's possession without the defendant's knowledge or consent.

The jury found a verdict for the plaintiff and assessed the damages at \$116, the amount due the plaintiff for board of said horses.

The defendant excepted to the ruling and instructions of the court, and the case is reserved and transferred for the opinion of the Superior Court. If this action can be maintained for the full amount of the board of the horses, judgment is to be rendered upon the verdict; if for no part of said board, judgment is to be rendered for the defendant; if only for the few days' board subsequent to the settlement, there is to be a

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new trial to ascertain the value of that board, unless the parties can agree upon the value.

A. W. Sawyer, Stevens & Parker, for defendant.

Fassett, Wadleigh & Wallace, for plaintiff.

LADD, J. The general property of the horses, carrying with it the right of possession, was in the defendant by virtue of the mortgages, subject of course to the right of redemption in Robinson. *Leach v. Kimball*, 34 N. H. 568; *Brackett v. Bullard*, 12 Metc. 308; 4 Kent's Com. 138, and *Bank v. Jones*, 4 N. Y. 497; and it is clear that, so far as regards any supposed power of the mortgagor to defeat this right of possession, and, in effect, abrogate this right of property by subjecting it to a lien, he stands in no different position from that of a bailee. The only question in the case, then, appears to be whether the statute giving a lien for the agisting of cattle, etc., is capable of such a construction as will permit any one having in his possession the animals of another to subject them to a lien for their keeping as against the owner, without his knowledge, acquiescence, or consent, express or implied. And I am of opinion that it is not.

The act provides that, "Any person, to whom any horses, cattle, sheep, or other domestic animals shall be intrusted to be pastured or boarded, shall have a lien thereon for all proper charges due for such pasturing or board, until the same shall be paid or tendered." Gen. Stats., ch. 125, § 2.

Now, if the whole construction of this act be made to turn on the word "intrusted," it undeniably follows that it makes no difference how the person intrusting animals to be boarded or pastured came by them, nor what his right to them is. A thief, a bailee, and an absolute owner are in this respect all put on the same footing. A sale of stolen goods by the thief passes no title against the owner, and the same is in general true with respect to a sale by a bailee, unless he has been so clothed with the *indicia* of title by the owner, or held out as authorized to sell in such way that the loss ought by reason of his own acts to fall upon the owner rather than on an innocent purchaser. The maxim, *Nemo plus juris in alium transferre potest quam ipse habet*, is one of very general application, and the rule in this country, to which of course there are exceptions, is, that the title of the true owner cannot be lost without his own free act and consent. 2 Kent's Com. 324; *Kingsbury v. Smith*, 13 N. H. 109; *Hyde v. Noble*, 13 id. 494; *Farley v. Lincoln* 51 id. 580; and see quite a forcible discussion of the whole subject by Senator VAN BUREN, in *Salus v. Everett*, 20 Wend. 267.

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The idea that a lien may be created by a contract of the possessor of animals for their keeping, the owner being in no way privy to such contract, when no rights whatever, as against the owner, could be conferred or created by a contract of sale, seems anomalous, to say the least. Such a thing would, as it seems to me, be a violation of the fundamental rights of property guaranteed by the Constitution; and if the legislature had undertaken by this act to create a lien, to arise on such a state of facts, I think it would be the duty of the court, as more than intimated by FOSTER, J., in *Jacobs v. Knapp*, 50 N. H. 82, to hold the act, so far, unconstitutional and void.

But I do not think any such intention is to be found in the statute. In giving this specific lien I think the legislature used the word in its legal and generally accepted sense, and that implies some privity between the owner, or person having the right of disposing of the goods, and him in whose favor the lien is claimed; and that by "intrusted" is meant intrusted by the owner or other person having authority to pledge the animals for such a purpose, that is, to suspend the owner's right of possession until the charges are paid.

Cases where it has been held that a common carrier, who innocently receives goods from a wrong-doer, without the consent of the owner, express or implied, has no lien upon them for their carriage as against such owner, seem to cover the whole ground and more. 2 Redf. on Railw. 171; *Robinson v. Baker*, 5 Cush. 187; *Stevens v. B. & W. Railroad*, 8 Gray, 262. The recent English case of *Threfall v. Boswick*, Law Rep., 7 Q. B. 711,* has reference to an innkeeper's lien, and, in my judgment, is not applicable to the case before us here.

The whole reasoning of FOSTER, J., in the carefully considered opinion of the court delivered by him in *Jacobs v. Knapp*, is against the position of this plaintiff; and that case must, as it seems to me, be regarded as quite a direct authority upon the question raised in the present.

Upon these views it is obvious that the plaintiff is not entitled to recover, upon the facts stated in the case; and the ruling and charge of the court, under which his right to recover was made to depend upon whether or not the horses were intrusted to him to be boarded, without reference either to the defendant's right and interest in them as mortgagees, or the nature and extent of Robinson's right and title, cannot be sustained.

CUSHING, C. J. It does not appear from the case that any question is made about the validity of the defendant's mortgages, or of his gen

* S. C., Law Rep., 10 Q. B. 210; published since this decision was announced

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eral right to the possession of the property; and, in the absence of any intimation to the contrary, I shall assume that not only the legal right of property, but, as against Robinson, the right of immediate possession, was in the defendant, so that two questions arise in the case. 1. Had any lien been created as between the plaintiff and Robinson, and to what extent? 2. If so, was the defendant bound by it?

It appears from the case that Robinson employed the plaintiff to board the horses at seven dollars per week, and that during a considerable part of the time he was hauling wood and timber for the plaintiff.

There is nothing in the case tending to show that Robinson was in any way employed as the servant of the plaintiff. He was paying for his board as well as for the board of his horses, and the evidence tends to show that he really had the exclusive care and possession of them during all the time that he was hauling wood and timber for the plaintiff.

There was no evidence tending to show that during that time the plaintiff had assumed any care or responsibility about the horses, or, in point of fact, had any possession of them. He appears to have furnished stable room and food, and nothing more, and Robinson appears to have had the whole possession, care, and exclusive responsibility. I think there was no evidence in the case which tended to show that during this time the horses were, in any just sense, *intrusted* to the care of the plaintiff. I cannot see any evidence that he had during this time any more care or responsibility than he would have had if Robinson had fed the horses in his own barn, taking the hay and grain from the plaintiff's barn. It appears to me, therefore, that entirely independently of the peculiar rights of the defendant in the property, to this extent the plaintiff had acquired no lien.

But it appears, also, that there were a few days during which time the plaintiff had the sole care of the horses, and during which time the evidence tends to show, that, as between the plaintiff and Robinson, the horses were intrusted to the plaintiff, within the meaning of the statute (Gen. Stats., ch. 125, § 2); and the question to be determined is whether, as between the plaintiff and defendant, Robinson could so intrust the horses to the plaintiff as to interfere with the defendant's rights.

The general principle seems to be perfectly well settled, that in regard to sales of personal property the buyer cannot shift from himself the responsibility of looking to the title to the property. *Caveat emptor qui ignorare non debuit quod jus alienum emit*. It is also settled that the

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seller cannot transfer to the buyer any right which he does not himself possess, unless the owner of the property has in some way put it in the power of the seller to assume the appearance of ownership and defraud the purchaser; and that merely intrusting a party with the possession by the owner is not such an act, unless he also in some way gives the party the *indicia* of ownership.

Now there seems no good reason why a party not the owner should be permitted to pledge the property, or create a lien upon it either at common law or by statute, any more than that he should be permitted to sell it. Neither is there any good reason why a person who is about to establish relations with another out of which a lien would be created should not make the same inquiries which it would be incumbent on him to make if he were going to purchase the property. If Robinson had sold the property to the plaintiff, there would seem to be no doubt that the plaintiff could acquire no more right than Robinson had. Does it make any difference that the plaintiff, in making his contract with Robinson for hauling wood, included in it a bargain to board his horses?

It is true that there are some employments of a public nature in regard to which it has been said that the party has from the nature of his employment no opportunity to make inquiry. Thus, in Bacon's Abridgment, title, Inns and Innkeepers, D, it is said: "Innkeepers may detain the person of the guest who eats, or the horse which eats, till payment, and this they may do without any agreement for that purpose; for men that get their livelihood by the entertainment of others cannot annex such disobliging conditions that they shall retain the party's property in case of non-payment nor make so disadvantageous and impudent a supposition that they shall not be paid; and therefore the law annexes such a condition without the express agreement of the parties." "If A injuriously take away the horse of B and put him into an inn to be kept, and B come and demand him, he shall not have him until he hath satisfied the innkeeper for his meat; for when an innkeeper takes a horse into his keeping, he is not bound to inquire who is the owner of the horse which he is obliged to keep, let him belong to whom it will, and therefore no reason that the innkeeper should be obliged to deliver him till he is satisfied."

So, in the case of common carriers, it has been sometimes maintained that the common carrier, being obliged to receive and carry goods which are brought to him, has a right to retain them till his charges are paid, whether he receives them for the true owner or not, provided he receives them innocently. To which it has been answered, that

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the carrier is not bound to receive goods until he has first been paid. It appears to me, however, that the weight of authority is in favor of the doctrine that the common carrier cannot acquire a lien more extensive than the right of his employer. 2 Redf. on Railw., § 188, and authorities cited. This doctrine is maintained in *Gilson v. Gwinn*, 107 Mass. 126.

It seems clear enough that the cases of the innkeeper and the carrier are exceptional, and however the law may be held in regard to them, there would be no reason why an ordinary bailee should not be held by the doctrine of *caveat emptor*, and I have seen no case in which it is held otherwise. My conclusion, then, is, that Robinson had not by law any authority to *intrust* the goods to the plaintiff's keeping.

In *Jacobs v. Knapp*, 50 N. H. 71, it is held that under Gen. Stats., ch. 125, § 14, no lien can be created except in favor of the party who contracts with the owner of the property, and I see no reason why the same construction should not apply to section 2 of the same chapter.

It is claimed in the plaintiff's brief that Robinson ought to be considered in law as the agent of the defendant; but I have seen no case in which it has been held that a party, who permits another to have possession of his personal property, by so doing in law constitutes that other his agent to sell or pledge that property.

It is suggested also, in argument, that the defendant, when he saw the horses at the plaintiff's barn, was bound to have given notice of his claim, but I do not see that any thing had been brought to the knowledge or notice of the defendant of any unlawful or dishonest dealing on the part of Robinson, which made it incumbent on the defendant to put the plaintiff on his guard.

It should be added that, by Gen. Stats., ch. 123, § 13, the sale or pledging of property situated as this was is made a penal offense, which would seem inconsistent with the idea that such sale or pledge could pass any title to the vendee or pledgee beyond that of the seller or pledgor.

SMITH, J. I am also of the opinion, that in order to create a valid lien under the provisions of Gen. Stats., ch. 125, § 2, in favor of one who takes domestic animals to be boarded, they must be intrusted by the owner, or some person having authority to intrust them, for such purpose. It is a universal principle, that a man's property shall not be taken from him without his consent. The general property in these horses was in the defendant, subject only to be divested by payment to him of the amount due upon the debt secured by the mortgages. As the

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lien claimed by the plaintiff exists under the above-named statute, the case is not strictly analogous to that of an innkeeper or common carrier. Many of the reasons which govern the decisions in those cases, however, will apply here.

In England the law seems to be, that an innkeeper has a lien on a horse for his keeping, put up by a guest who had come fraudulently by it from the true owner. And this is put upon the ground that the innkeeper is obliged to receive the guest and his horse. *York v. Grenough*, 2 Ld. Raym. 866; *Threfall v. Borwick*, Law Rep., 7 Q. B. 711, and cases there referred to.

It is not necessary in deciding this case to inquire whether the English doctrine in regard to an innkeeper's lien under such circumstances has ever been adopted in this State. The public character of the business of an innkeeper and of a common carrier may furnish some reason for not applying to them the principle of *caveat emptor*. But the general current of the authorities in this country is against the rule, as established in the case of the *Exeter Carrier*, referred to in *York v. Grenough*, *supra*, of exempting a carrier from the application of the rule of *caveat emptor*. It is expressly so denied in *Robinson v. Baker*, 5 Cush. 137, where it was held that a common carrier, who innocently receives goods from a wrongdoer, without the consent of the owner, express or implied, has no lien upon them for their carriage against such owner. *Fitch v. Newberry*, 1 Doug. (Mich.) 1, is to the same point, and is a case carefully considered and shows a full examination of the authorities. There are many hard cases, as suggested by Judge FLETCHER in *Robinson v. Baker*, *supra*, of honest and innocent persons, who have been obliged to surrender goods to the true owners without remedy for the money paid; and this is especially true of auctioneers and commission merchants, who have made advances upon goods which they have been compelled to surrender to the rightful owner. But these are hazards to which persons in business are continually exposed.

This plaintiff was not an innkeeper, nor, so far as the case shows, was he the keeper of a livery or boarding stable, and was therefore under no obligation to take these horses from Robinson to board. Why, then, should not the principle of *caveat emptor*, which is so universally applied to vendees of personal property, and even to the common carrier, be applied to the plaintiff? Why should he not be required to examine the title of Robinson to these horses, as well as persons in other departments of business be required to examine the title of those from whom they purchase? The common carrier, although obliged to receive goods from the true owner for carriage, is not obliged to receive them unless

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his charges are paid, nor to receive them at all from the wrong-doer; and if he has no lien as against the rightful owner upon goods received from the wrong-doer, much less it would seem ought the plaintiff, who was under no compulsion or obligation to receive these horses, but did receive them voluntarily, to have a lien thereon against the defendant, who was their rightful owner.

The plaintiff's claim to have a lien on these horses is by virtue of the statute, and not at common law. As Robinson, who undertook to pledge them, had no authority to do so, the defendant was entitled to a verdict. The verdict must therefore be set aside, and according to the provisions of the case, there must be

Judgment for the defendant.

LAIRD V. CONN. & PASS. RIVERS RAILROAD.

(55 N. H. 375.)

Removal of suit to Federal court.

A citizen of New Hampshire brought action against a Vermont corporation, and afterward in good faith, moved to and became a citizen of Vermont. Afterward the defendant petitioned for a removal of the cause to the United States Circuit Court. *Held*, that both parties being citizens of the same State at the time of the petition, the removal could not be had.

ACTION on the case for negligently setting fire to and burning plaintiff's property. At the time suit was brought, plaintiff was a citizen of New Hampshire, but afterward and during the pendency of the action, he removed in good faith to Vermont, and became a citizen of that State. Thereafter the defendant, a Vermont corporation, filed a petition for a removal of the cause into the United States Circuit Court.

The questions arising on the foregoing statement and motions were transferred to this court for determination by LADD, J.

Geo. A. Bingham (with whom were *Burke* of Vermont, and *Spring*) for defendants, cited *Morgan v. Morgan*, 2 Wheat. 290; *Dunn v. Clarke*, 8 Pet. 1; *Clarke v. Mathewson*, 12 id. 164; *United States v. Myers*, 2 Brock. 516; *Green v. Custard*, 23 How. 484; *Hatch v. Dorri* 4 McLean, 112; *Thaxter v. Hatch*, 6 id. 68; 1 Abbott's U. S. Prac. 212 *Kinnouse v. Martin*, 15 How. 198.

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Carpenter (with whom was *H. Bingham*), for plaintiff, cited *Huff v. Hutchinson*, 14 How. 586; *M'Nutt v. Bland*, 2 id. 9; *Dwar.* on Stats. 558-565; *Mollan v. Torrance*, 9 Wheat. 537; *Dunn v. Clarke*, 8 Pet. 1; *Morgan v. Morgan*, 2 Wheat. 296; *Smith v. Kernochen*, 7 How. 198.

LADD, J. The fact of the plaintiff's removal to Vermont in good faith six months before the bringing of this petition was established in the court below by the admission of the parties. The plaintiff desired to have that fact adjudicated in some way, in order that upon error to the judgment of this court in the Supreme Court of the United States it might appear as part of the record; and the motion incorporated in the case was made with that view. Undoubtedly the fact of the plaintiff's removal to Vermont must in some way appear at the hearing on error, otherwise the question we are to decide will not be before the Supreme Court at all. But it seems unnecessary to consider this very unusual motion, because, as error must be brought to the judgment of this court, the record must show the facts upon which our present decision is based, as they appear in the statement sent here by the Circuit Court.

I am of opinion that the petition to remove the cause to the Federal court should be denied; and I base my judgment on the broad reason that by the Constitution of the United States the Federal court had, and could have, no jurisdiction of the parties or the cause at the time the motion was made.

Under the judiciary act of 1789 the right to remove was confined to defendants, and the application must be made at the first term. It was then thought to be wise and just that the plaintiff, by bringing suit in the State court, should be held to have made his election in what tribunal to proceed, and to have thereby waived his constitutional right to sue in the Federal court; while the defendant, by omitting to apply for a removal at the first term, should be held in the same way to have waived his constitutional right to have the controversy settled in a different tribunal. Whatever doubts may have been entertained as to the constitutionality of the acts of 1866 and 1867 whereby this long-established course of practice was interrupted and changed, those doubts are now to be regarded as settled in favor of the acts. But in interpreting and administering those acts, which merely regulate the mode in which a party may avail himself of his constitutional right in that regard, no construction can be given them which shall have the effect to create jurisdiction in the Federal courts, or in any way impair or trench upon the jurisdiction of the several States. That is matter entirely beyond

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legislative interference or control, always to be determined by a just interpretation of the Constitution of the United States. Congress may regulate the enjoyment of the right, but the right itself rests upon the higher guaranties of the Constitution.

Here was a suit commenced in August, 1872, by a citizen of New Hampshire against a citizen of Vermont. At the first term, September, 1872, the defendants' right was absolute, under the Constitution and the act of 1789, to have the cause removed to the Federal court upon furnishing the securities thereby required: not choosing to avail themselves of that absolute right, they still had a qualified right under the act of 1867 to have the cause thus removed, upon filing the affidavit required by that act. Three terms of the State court, separated by intervals of six months, passed, and no application for removal was made. During all this time there was a right, which rested upon the provisions of the Constitution as to jurisdiction, because the parties were all the time citizens of different States; and this existing right was doubtless of such a character that its exercise might legally be regulated by act of Congress. But then the plaintiff moved into and became a citizen of the same State with the defendants. What is there any longer to uphold the right? The controversy is not now between citizens of different States, but between citizens of the same State. The right was not exercised while it was in existence by virtue of the Constitution which alone created it. Jurisdiction was never vested in any Federal court. Any different conclusion, drawn from an inspection of the record or a consideration of the state of things existing at the time the suit was commenced, seems to me to rest on ground quite too narrow: an important constitutional right is hardly to be determined by technicalities. If the right had been exercised before the very condition upon which its existence depended was destroyed, and the plaintiff had afterward removed to Vermont, an entirely different question would be presented. In that case, there would be a foundation for the jurisdiction of the Federal court; and when that jurisdiction has been once attached, it clearly cannot be ousted by the subsequent act of either party. The trouble here is, the jurisdiction never attached, and no move was made in the direction of establishing it until the right upon which it must be based was gone.

I have looked into all the cases decided by the Supreme Court of the United States, supposed to bear upon this question, to which our attention has been called by counsel, but have not been able to find any thing which, in my judgment, can be regarded as in conflict with these views. *Kunouse v. Martin*, 15 How. 198, is clearly and broadly distinguishable from the present case by the fact that the amendment reducing the

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amount claimed below five hundred dollars was allowed after the motion to remove had been made and the power of the State court over the cause was at an end.

CUSHING, C. J., concurred.

SMITH, J. This is a petition to remove an action from the Circuit Court of this State into the Circuit Court of the United States for this district. The statute under which the petition is brought is the third clause of section 639 of the Revised Statutes of the United States, approved June 22, 1874, which is as follows:

"Third. When a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if, before or at the time of filing said petition, he makes and files in said State court an affidavit stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court." There is a further provision for filing bond with surety, etc., for his entering the suit in the Federal court, with copies, etc., which is unnecessary to notice further.

The only question before us is, whether this is a suit "between a citizen of the State in which it is brought and a citizen of another State. It was such a suit at the time it was brought and entered in court, and so continued up to March, 1874; and the case sent up to us from the court below shows that since March, 1874, neither party has been a citizen of this State in which the suit was brought.

The right of removal depends upon the citizenship of the parties, but whether at the time the suit was brought or at the time the petition for removal was filed, is the question presented for determination.

It was in the power of the defendants to remove this suit into the Federal court upon petition filed before the removal of the plaintiff into Vermont. This privilege they did not see fit to avail themselves of. The State court had jurisdiction of the case up to that time, liable, however, to be divested by removal of the cause to the Federal court. After the removal of Laird from the State, the action ceased to be any longer a suit "between a citizen of the State in which it was brought and a citizen of another State," but became a suit between citizens of the same State.

It has been repeatedly settled in the Supreme Court of the United

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States, that when the jurisdiction of the Federal court has once attached it cannot be divested by a change in the citizenship of the parties. *Wallace v. Torrance*, 9 Wheat. 537; *Morgan v. Morgan*, 2 id. 290; *Dunn v. Clarke*, 8 Pet. 1; *Clarke v. Mathewson*, 12 id. 170; *Greene v. Custard*, 23 How. 484; *Kanouse v. Martin*, 15 id. 207.

If this suit had been removed to the United States Circuit Court before the removal of the plaintiff to Vermont, the jurisdiction of that court having once attached to the suit could not have been affected or divested by such removal of the plaintiff. The State court has had jurisdiction of this case since the commencement of the suit, liable to be defeated as long as the parties remained citizens of the respective States in which they had their domicile at the time the suit was commenced; but no steps having been taken to divest the State court of jurisdiction by removal to the Federal court when it was in the power of the defendants so to do, it cannot be divested of its jurisdiction when the condition of citizenship upon which such right of removal is grounded no longer exists. It will hardly be contended that where a suit is commenced in a State court between citizens of the same State, the defendant, if the plaintiff should remove into another State, would acquire the right to remove the cause into the Federal court, because, upon the strength of the above decisions, the State court cannot be ousted of its jurisdiction when it has once attached.

Upon the same ground I think this petition must be denied, to wit, that the cause not having been removed while the parties were citizens of different States, the jurisdiction of the State court became unalterably attached when the parties became citizens of the same State, and there no longer existed the ground for removal provided by the statute. I know of no practice of the court to authorize the granting of the plaintiff's motion, to be hereafter described in the future orders and processes issued in this case as of St. Johnsbury, Vermont. Although I see no particular objection to it, I see no necessity for granting the motion.

Petition denied.

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ADDEN v. WHITE MOUNTAINS RAILROAD.

(55 N. H. 413.)

Damages — to owner of lands taken for a railroad.

In awarding damages to the owner of lands taken for a railroad, the exposure of his remaining land and buildings to fire from the railroad engines may be taken into consideration, notwithstanding the company is by statute liable for any fire so caused; but the benefits which the owner in common with others derive from the railroad cannot be considered to reduce his damages.

APPEAL from an award made by the Railroad Commissioners and Selectmen of Northumberland for appellant's lands taken by the defendants. The defendants claimed that the benefits and advantages of the railroad to appellant in affording him increased facility for removing his produce, etc., should be considered in reduction of damages; while on the other hand the appellant claimed that the increased liability of his house, which was situated about 100 feet from the line of the road, to fire from the railroad engines and the increased cost of insurance should be allowed for.

The judge, however, charged the jury that since, by the provisions of the Gen. Stats., ch. 148, § 8, the proprietors of a railroad were made "liable for all damages which shall accrue to any person or property by fire or steam from any locomotive or other engine on such road," no damages in respect to this matter could be allowed. To these rulings and instructions the appellant excepted. The jury awarded as damages \$450.

Case reserved.

Fletcher & Heywood, for plaintiff.

Ray & Drew (with whom was *Bingham*), for defendants.

SMITH, J. The rule in regard to the assessment of damages for land taken for a public highway is well settled in this State. Nothing is to be deducted on account of benefits and advantages not peculiar to the owner of the land so taken, but which are general, and shared in by other land-owners in the vicinity. He is entitled to compensation, not only for the land actually taken, but for the damage to the whole tract through which the road passes, which includes the diminished value of what is left. If the result of the construction of the highway is inevitable to raise the value of all the lands in the neighborhood, he is as much entitled to his share of the general advantages, without compensation, as others whose lands are not taken. To require him to offset such advan-

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tage against his damages for the taking of his land, would require him to bear a portion of the expenses of the highway which should be borne by the public, and would be manifestly unequal. This rule is correct on principle, and is abundantly supported by authorities. *Carpenter v. Landaff*, 42 N. H. 218; *Petition of Mt. Washington Road Co.*, 35 id. 134. The same rule is also adopted in Massachusetts. *Meacham v. Fitchburg Railroad Co.*, 4 Cush. 291; *Upton v. South Reading Branch R. R.*, 8 id. 600; *Whitman v. Boston & Maine R. R.*, 3 Allen, 133; S. C., 7 id. 313; also in other States. Redf. on Railw., 2d ed., * 133, sec. IX, § 71, and authorities there cited.

This rule is equally applicable to a railway corporation as to a public highway. Railroad corporations are declared by statute to be public highways. Gen. Stats., ch. 146, §§ 1, 3. A turnpike road is a public highway, differing from free roads only in the manner of use. All citizens may use a turnpike by paying the established toll. *Backus v. Lebanon*, 11 N. H. 24, cited by PERLEY, C. J., in *Pet. of Mt. Washington Road Co.*, 35 id. 140, where it was held that "the power to take private property for public use may be exercised by the government through the means of a private corporation. The fact that the members have a pecuniary interest, such as will give it in law the character of a private corporation, will not prevent the State from using it to accomplish a public object."

In awarding full indemnity to the owner for land taken from him for public uses by authority of law, several elements are to be taken into the account. The diminished value of what is left is one very important fact. This diminished value may arise from several causes, such as the inconvenient separation of the track, rendering the buildings less commodious, interrupting the supplies of water for cattle or irrigation or household purposes, and the like (*Carpenter v. Landaff*, *ubi supra*); to which may be added the nearness of the track to the owner's buildings, the inconvenience caused thereby, and "the imminent and appreciable danger from fire," and the like. *Proprietors of Locks, etc. v. Nashua & Lowell R. R.*, 10 Cush. 385; Redf. on Railw., 2d ed., * 155, note 10, and authorities cited.

The law does not afford indemnity for all losses occasioned by the laying out and use of a railroad, especially for such damages as are remote and consequential. They are damages not caused by the taking of the land for the road, but by the change which the public improvement introduces into the course of business. It affords no protection against new competitions, nor against changes introduced by time and the progress of the age (*Pet. of Mt. Washington Road Co.*, 35 N. H. 146, and *Proprietors of Locks, etc. v. Railroad*, 10 Cush. 389); nor does it afford relief against such inconveniences as "the whole community suffer alike,

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in a greater or less degree, and which are to be borne by the public in consideration of the greater public good to be acquired." Ib. 391. But whatever tends directly and substantially to diminish the value of the tract of land left to the owner, who has been compelled to part with the possession of a portion thereof for the public good, should be weighed and considered in awarding him his damages. That imminent and appreciable danger from fire does so diminish the value of his property, there can be no question.

The defendants' road is located 100 feet from the plaintiff's dwelling-house. It is unquestionably material for the jury to consider whether his damages are not greater with the track 100 feet distant, than they would be at a distance of 100 rods. The location of the track, and all such matters as grow out of and are caused by the location, are proper matter for the jury to consider.

It is claimed here by the defendants that the plaintiff is insured by the statute, which in case of loss makes the defendants liable to the plaintiff (Gen. Stats., ch. 148, § 8), and, therefore, that the element of the enhanced cost of insurance should not be considered in awarding his damages. But I think this does not follow. His buildings may never burn. If they do not, of course the railroad cannot be called on to pay. But is the plaintiff to go without insurance because the railroad is made liable? It is the part of prudence for one to keep well insured. Is the owner compelled to rely on the railroad? Suppose the road happens to be insolvent, as many railroads are: where would be his security? Suppose, in case of loss by fire of his buildings, the railroad contest their liability on the ground that the fire did not originate from their locomotives: it is often not only difficult, but impossible, to prove the origin of a fire. The liability of the railroad extends only to fires caused by their locomotives or engines. Gen. Stats., ch. 148, § 8.

It cannot be successfully contended that the owner is not entitled to insurance against fire which may happen from *any* cause; and if he is unable to obtain such insurance without paying a higher premium therefor because of the increased danger resulting from the proximity of the railroad track to his buildings, that surely must constitute an appreciable and serious detriment to the owner. The rate of insurance being increased operates proportionally to diminish the value of the rent and of the buildings. Redf. on Railw. *155, note 10.

It is no sufficient answer to say the owner might purchase a policy at the usual rate by agreeing to the insertion of a clause exempting the insurance company from liability in case of loss or damage by fire occasioned by the locomotives of the railroad company. To say nothing of

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the difficulty he might encounter in procuring such a policy, or of the mistakes and misunderstandings that would naturally ensue, it would very likely end in litigation, the railroad on the one hand denying their liability, and the insurance company on the other claiming that the fire originated from the railroad company's engines; and so the owner, in addition to having lost his property by fire, would be placed between two other fires where the result might prove equally disastrous.

By section 10, any insurance effected by the owner inures to the benefit of the railroad company in case of loss occasioned by them, so that the owner receives no advantage from his insurance in case of payment by the railroad company of his damages; and unless the company do pay, he has only been able to procure partial indemnity for his loss by paying an increased premium therefor. This section applies not only to the owner whose land has been taken in the construction of the road, but to any person whose property may be damaged by fire from the company's engines; and there would seem to be equal reason for claiming that no one whose property is located on the line of the road need protect it by insurance because the railroad is made liable in case of loss by fire from its engines, as to claim this in behalf of the owner whose land has been taken by the road in its construction. The danger of loss by fire communicated from the company's engines is only one of the many dangers from that source that threaten the owner's property; but owing to the proximity of the track to his buildings, he cannot protect them from this source of danger except at a price enhanced in consequence of this act of the defendants.

That no evidence was laid before the jury upon the subject of insurance does not alter the aspect of the question. The jury were instructed that no damages on account of increased insurance should be allowed; and the only conclusion we can draw is, that none were allowed on that account. I think the instructions were erroneous upon this point.

The instructions in regard to any peculiar advantage which the plaintiff might acquire from the construction of the road seem to recognize as a fact, that the facility thereby afforded him for transporting his pine trees to market was in itself an advantage of that peculiar character that would require him to offset such advantage against his damages for the land taken. Giving a land-owner access to his land where he had none before would not ordinarily be considered a benefit for which he should pay, but rather in the light of a general improvement in which many would share. See *Carpenter v. Landaff*, *supra*, 224, where BELLOWS, J., remarked: "It is true that there may be cases where a

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single land-owner would be furnished such access where none existed before; but ordinarily it would be otherwise, and the cases would be extremely rare when many were not benefited by improved means of access. Indeed, such a state of things could hardly be expected at all, unless in a case of a private road."

The fact that the road gave the plaintiff access to his trees was not in itself such a peculiar advantage as to require him to submit to a reduction of his damages on that account. It does not appear but what others in the vicinity, whose land was not taken, were benefited in the same manner if not to the same extent. The instructions were not sufficiently explicit upon this point.

For these reasons I think the verdict must be set aside.

CUSHING, C. J. The question is, whether by our law there can be any circumstances which ought to be taken into consideration showing some advantages derived by the proprietor, which ought to be set off against any portion of the damages to which the land-holder would otherwise be entitled. There are certain cases which have been decided in which it has been intimated that such a state of facts might exist, but I do not think that principle has often, if at all, been made the basis of a judgment and a reason for the allowance of such set-off.

All the cases seem to recognize the principle, that no reduction of damages is to be made by reason of any benefit derived to the land-holder, belonging to the same class of benefits as are shared in common by all the land-holders in the vicinity. If there be any case for such set-off, it must be an exceptional one.

Now, it seems to me that if there be any class of benefits which is emphatically shared by all, it is that class which has its origin in increased facilities for transportation. One man is enabled to get his pine timber to market, another opens his granite quarry, a third may have a large grass farm, and finds increased facility for taking his pressed hay to market. These facilities are greater or less in proportion to the proximity of the land to the railroad or the station, but they all belong to the same class. They all belong to the class of general benefits, which is open to all and shared alike by all.

I think, therefore, that the charge, in recognizing, as I think it does, that the fact of the pine timber existing on the line of railroad is exceptional and the benefits derived from it peculiar, was erroneous. It is true that in the end it would be a question of fact whether or not, under the existing circumstances, there was an exceptional benefit. But I think that lot of pine timber, standing near the track, was in itself no

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more exceptional than a turnip field or a grass meadow, and that the jury should have been so instructed.

It seems to me, also, that there was error in the instruction of the court in regard to the insurance. The fact that the buildings were near the railroad was before the jury, and that in itself was evidence from which they might form some judgment as to the risk of damage from the fire. It seems plain enough that the legal liability of the railroad corporation to indemnify against damages by fire from their engines was a very poor substitute for insurance. Seeking an indemnity from a railroad corporation, taking upon one's self the burden of showing that the loss was occasioned by fire from the engine and not by any of the other numerous means by which fire might be occasioned, is quite a different thing from seeking indemnity from an insurance company. The responsibility of railroad corporations, too, taking them one with another as railroad corporations exist in the country, is a very different thing from the responsibility of such an insurance company as the party may himself see fit to select. It was, therefore, a question of fact, which might well have been submitted to the jury, whether, under all the circumstances, the increased danger of fire from the engines could be so balanced by the liability of the corporation as to leave no diminution in the value of the property.

LADD, J. The land-owner is entitled to compensation for such damage as will result to him from the proper construction, maintenance, and operation of the road over the land taken for that use; and I am of opinion that exposure of his remaining land, whether occupied by buildings or not, to fires by the company's engines, is a proper element to be considered in making the estimate. 1 Redf. on Railw., ch. 11, §§ 74, 82, and cases in notes.

This being so, the question is, whether the statute imposing an absolute liability upon the company to pay all losses occasioned in that way necessarily covers the whole ground so as to leave nothing for estimation on that score; and I think it does not.

Our statute on this subject is in effect identical with that of Massachusetts. In *Pierce v. W. & N. Railroad Co.*, 105 Mass. 199, COLT J., says: "It is plain that this indemnity [that furnished by the statute] is not so perfect and complete as to preclude, in the estimate of damages, a consideration of the direct effect of a constant liability to destruction by fire from this new source upon the present value of a dwelling erected upon the remaining portion of the estate, as a safe and comfortable residence, or for purposes of sale. The present value of the

property must be to some extent depreciated although there is a chance that the buildings may never be destroyed by fire, and although, if they are, it is certain that the owner, whoever he may be, will be indemnified under the statute for the actual loss he sustains. The injury to be measured in the assessment of damages occasioned by the location of the railroad, in this respect at least, is broader than the indemnity of the statute."

It is argued that the facts shown on the trial did not call for or warrant the instructions requested, inasmuch as there was no evidence as to insurance one way or the other. But the exception was to the instruction given, as well as to the refusal to give those requested; and I think the only just interpretation that can be put upon the case as reported is, that the jury and counsel, as well as the court, must have understood that no damages could be given on account of exposure to fire from this source by reason of the indemnity for actual loss furnished by the statute, to the provisions of which the attention of the jury was specially directed by the court. I think this was erroneous, and that this exposure was proper matter for consideration by the jury, of course under proper instructions as to making due allowance for the indemnity provided by the statute.

The general proposition given to the jury, as to special benefits to the land-owner arising from the construction of the railroad, were clearly correct; but I doubt the correctness of their application upon the facts reported. How do the facilities afford the appellant with respect to his growing pine trees standing on the land adjacent to the railroad, and the consequent benefit to him, differ in kind from the advantages and benefits enjoyed by all the owners of similar lands in the neighborhood? It seems to me at most a mere matter of degree, dependent upon the distance of such lands from a station or turn-out on the proposed road. If it had appeared that the company had constructed, or bound themselves to construct, a turn-out or side track for the special accommodation of the appellant in getting his pines to market, a different case would be presented. As it is, I am inclined to the opinion that this was not a case where the jury were authorized to make any deduction on account of supposed special benefit to the land-owner. See remarks of PERLEY, C. J., in *Pet. of Mt. Wash. Road Co.*, 85 N. H. 147.

Verdict at aside.

Murray v. Warner.

MURRAY V. WARNER.

(55 N. H. 546.)

Carrier — action against by bailee for misdelivery.

Plaintiff, a common carrier, received goods marked "C. O. D." to be delivered at a point beyond his line and delivered them to defendant, a connecting carrier, to be transported to their destination and delivered. Defendant delivered them without collecting payment. Held that the plaintiff could maintain an action against defendant for such wrongful delivery.

ACTION on the case for the wrongful delivery of goods.

Plaintiff was an express carrier between Newmarket and Boston. On Oct. 27, 1870, one Haley delivered to plaintiff a package containing a coat and vest and directed to "C. M. Abell, Amesbury," to be left at the American House, and accompanied by a bill containing the following: "C. M. Abell to B. F. Haley, Dr., 1 Coat and vest. C. O. D. 6 Spring-beds, \$27.00." Amesbury was not on plaintiff's line and at the nearest point he delivered the bundle with the bill attached to defendant, also a common carrier, to be delivered as directed. Defendant delivered the bundle to the consignee without collecting the amount due, and the plaintiff brought this action. There was no pretense that plaintiff had been compelled to pay Haley. The plaintiff had judgment and the case was reserved as to whether the plaintiff was the proper party.

Marston, for defendant, cited *Gray v. Jackson*, 51 N. H. 9; S. C., 12 Am. Rep. 1; *Railroad v. Manufacturing Co.*, 16 Wall. 318; *Price v. Oswego Railroad*, 58 Barb. 599; *Weed v. Barney*, 45 N. Y. 344; S. C., 6 Am. Rep. 96; *Railway Co. v. Merrill*, 48 Ill. 425; *American Ex. Co. v. Lesem*, 39 id. 312; *Salinger v. Simmons*, 2 Lans. 325; *Williams v. Holland*, 22 How. Pr. 137.

Wiggin, for plaintiff, cited *Elkins v. Railroad*, 19 N. H. 387; *Mayall v. Railroad*, 19 id. 122; *Woodman v. Nottingham*, 49 id. 387; S. C., 6 Am. Rep. 526; 2 Redf. on Railways, § 175, par. 8 and 9; *Shearm. & Redf. on Negligence*, § 54; *Bowlin v. Nye*, 10 Cush. 416; *Robinson v. Austin*, 2 Gray, 564; *Angell on Carriers*, §§ 319, 432; *Lichtenhein v. Railroad*, 11 Cush. 70; *Hyde v. Trent Nav. Co.*, 5 T. R. 389.

SMITH, J. 1. The first question reserved is, whether this action can be maintained in the name of the present plaintiff: and upon this point the authorities are quite uniform. A bailee of goods for hire may sustain an action against a carrier for negligence; and it can make no dif-

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ference whether such bailee was himself a carrier, to whom the goods had been originally intrusted for carriage to a point not on his route. These goods were delivered by the owner, Haley, to the plaintiff, to be carried to Amesbury, and payment for the same to be collected in spring-beds. It is unnecessary to inquire whether, if this were a case between Haley and Murray, there is evidence of a contract on the part of Murray for the carriage of these goods to a point beyond his line, and by an agent not in his employ (*Knapp v. Express Co.*, 55 N. H. 348) or whether his responsibility ended at the terminus of his route; for the right of Murray to maintain this action does not depend on his liability to Haley. He had the possession and custody of the goods as bailee, and not as servant of Haley; and the defendant is liable, if liable at all, for his failure to perform the duty imposed upon him by contract or by law.

In *Freeman v. Birch*, 1 Nev. & Man. 420, the plaintiff, a laundress residing at Hammersmith, was in the habit of sending linen to and from London by the defendant's cart, which traveled from Chiswick to London. A basket of linen belonging to Spinks was sent by the defendant's cart, and on its way to London part of the contents was either lost or stolen. Spinks did not pay the carriage of the linen. It was objected that the action was misconceived, and should have been brought by the owner of the linen. The objection was overruled, and a verdict returned for the plaintiff. The verdict was sustained, upon the ground that the laundress retained a special property in the goods.

To the same point is *Mayall v. B. & M. R. R.*, 19 N. H. 128, where GILCHRIST, C. J., says: "If a person has a beneficial interest in the performance of a contract, or a special property or interest in the subject-matter of the agreement, he may support an action in his own name upon the contract." In *Elkins v. B. & M. R. R.*, 19 id. 337, it was held by the same learned judge, that where a bailee of property delivers it to a carrier for transportation, either the bailee or bailor may maintain an action against the carrier to recover for the loss of the property. "The rule in such cases is stated by PARKE, B., to be, that either the bailor or the bailee may sue, and whichever first obtains damages it is a full satisfaction." *Nicolls v. Bastard*, 2 Crompt. Mees. & Ros. 660; and in *Woodman v. Nottingham*, 49 N. H. 387, NESMITH J., says: "A bailee, having a special property, may recover the whole value of the property, holding the value beyond his own interest in trust for the general owner, and the judgment recovered by the bailee may be pleaded in bar to any action that might be afterward brought by the general owner for the same property." See, also, 2 Kent's Com. 566; 2 BL Com. 396; Greenl Ev., § 637, note 4.

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2. The instructions to leave the bundle at the American House were only a part of the directions to the defendant. He was also directed by the bill which accompanied the bundle to collect pay upon delivery of the goods in six spring beds; and subsequently, when he called for further explanation, was instructed to collect the beds, or their value \$27, in money. He did not, therefore, perform his whole duty when he left the bundle at the American House, where it was directed to be left. Where a common carrier has tendered the goods intrusted to him to the consignee and demanded payment, and the consignee has had a reasonable time to call for and receive them, he holds the goods as a warehouseman, and not as a common carrier, and is thereafter responsible for the care of a warehouseman merely. *Weed v. Barney*, 45 N. Y. 344; S. C., 6 Am. Rep. 96. But the defendant, whether holding these goods as common carrier or warehouseman, could not disregard the conditions upon which the delivery was authorized. If, while holding them in the latter capacity, they had been destroyed by extraordinary peril, he would not have been liable for their loss. *Weed v. Barney*, *supra*. But there is no pretense of any thing of that sort here. When payment was refused, the defendant might have discharged himself from further liability by placing the goods in store (*Salinger v. Simmons*, 2 Lana. 325; *Williams v. Holland*, 22 How. Pr. 137), or he might have notified the plaintiff, and asked for further instructions, or have returned the goods to the plaintiff. But he could not, after having undertaken to carry the goods upon the conditions imposed, relieve himself of responsibility by abandoning them to the clerk of the American House, with the declaration that he had "nothing to do with them."

A mis-delivery of goods by a common carrier is a conversion of them, and renders him liable in trover, for it is an unlawful act (*Boulton v. Nye*, 10 Cush. 416; *Devereux v. Barclay*, 2 B. & A. 702; *Harbison v. Hoffman*, 6 Hill, 586); and delivery by a warehouseman of goods to a third person, even by mistake, renders him liable for the goods. *Lichtenhein v. Railroad*, 11 Cush. 70. Delivery to the right person, in violation of the conditions upon which delivery is authorized, would seem to be as much a wrongful act as delivery to the wrong person.

By leaving the goods with the clerk of the American House, the defendant made him his agent; and if the goods may be regarded as left at the American House in store, the defendant was bound to see that they were not delivered to Abell, except upon his complying with the terms imposed by the plaintiff. His neglect to do so must render him liable to the plaintiff. The presiding judge has found, that the defendant, before he examined the bill, understood that the goods were to be paid for on

delivery ; but, upon examining the bill and finding that it was payable in spring beds, and Abell asserting that Haley had received them, he sent for and received explicit instructions to get either the spring beds or their value in money, according to the bill. For suffering these instructions to be disregarded, he has become liable to the plaintiff for the value of the goods intrusted to him.

CUSHING, C. J. In this action, the court has reported certain facts as being the result of the whole investigation. On these facts the court found — *i. e.*, from these facts the court inferred — that the defendant was guilty ; and the question to be settled by the court is, whether the facts which were proved and found tended to prove the affirmative of the issue. The case does not refer to the finding of any facts to this court, but simply refers the questions of law arising on the facts reported. In other words, as I have already said, it refers the question whether the court, from the facts found, could legally and logically reach the result which it did reach.

The property was not owned by the plaintiff. The contract out of which the defendant's liability, if he was liable, grew, was made by him with the plaintiff. Was the plaintiff, in doing this, acting merely as the servant of the owner of the property ? or was he so much more than a mere servant as entitled him to be considered as a special owner ? and could the court infer this fact from the facts proved ? Was he a mere servant, so that his possession was the possession of the general owner ? or had he such an independent possession and such a special interest as entitled him to be considered a special owner ?

The property was intrusted to his care as bailee, and he had a special interest in the performance of his part of the contract, his compensation most probably depending upon his successful performance of it. If he had been a mere servant, it is probable that his compensation would not depend upon his successful performance of the work. If he did, with such diligence and capacity as he was capable of, the work assigned to him, he would be entitled to his day's wages.

So, if the plaintiff in the execution of this work had by his negligent management of his team caused an injury to some third person, the general owner of the property would not be liable for that negligence, while, if he were a mere servant of the general owner, the latter might be liable.

I think the court might well have found from the facts that the plaintiff was bailee, with a special interest and accountability.

The authorities cited by the plaintiff abundantly show that this

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special interest was sufficient to entitle the plaintiff to maintain the action.

It appears to me, also, that the facts tended to show that the defendant had accepted the employment, with the understanding that he was not to deliver the goods without receiving payment at the same time; and that it was through the defendant's neglect of this order that the goods were lost to the plaintiff and to the general owner.

The court, therefore, rightly inferred, from the facts proved, the affirmative of the issue; and there must be judgment on the verdict for the plaintiff.

LADD, J. I supposed the only question raised by the case was, whether the action can be maintained in the name of this plaintiff; and that it can is sufficiently settled by the authorities already referred to.

If it is to be assumed, however, that the farther question, whether a verdict for the plaintiff could be legally based upon the facts reported, is before us, I am of opinion that there was evidence to sustain such verdict. That evidence tended to show, in the first place, an undertaking by the defendant not to deliver the package and receipted bill except upon compliance by Abell with the condition and order written on the margin of the bill ("C. O. D. six spring beds"). It also tended to show a breach by the defendant of his obligation and duty as a bailee of goods, such as to make him liable for their loss. The evidence reported seems to be the same in kind, though differing in degree, as though the defendant had thrown the package over the first bridge he crossed, after finding out that the pay for it was to be collected in spring beds instead of money; and it was for the judge who tried the cause without a jury to determine the weight of that evidence.

I agree with my brethren that there should be

Judgment on the verdict.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

THE PULLMAN PALACE-CAR COMPANY, appellant, v. REED.

(75 ILL. 125.)

Damages — against carrier for expulsion of passenger.

A passenger who had purchased a ticket for a berth in a sleeping-car, lost it and gave evidence to the conductor that he had done so and refused to pay over again, whereupon the conductor expelled him, without violence, from the car and he was compelled to ride in a common car. *Held*, that plaintiff could recover of the owners of the sleeping-car the price he paid for his ticket and a reasonable compensation for his trouble and inconvenience; but that he could not recover exemplary damages, and that a verdict for \$3,000 was excessive.

ACTION on the case by William Reed against The Pullman Palace Car Co. The opinion states the facts.

Walker, Dexter & Smith, for appellant.

Eustace, Barge & Dixon, for appellee.

SCHOLFIELD, J. This was case, by appellee against appellant, for ejecting him from one of its sleeping cars. The verdict of the jury was for appellee, assessing his damages at \$3,000. Motion for a new trial was made by appellant, and overruled by the court, and judgment given on the verdict, from which this appeal is prosecuted.

The principal error insisted on in argument is, that the damages, as assessed, are excessive.

The facts connected with the alleged wrong, as detailed by appellee

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in his examination, are these : On the 21st of January, 1873, appellee purchased at appellant's ticket office in Chicago, a sleeping-car ticket for berth No. 4 in appellant's car known as No. 184, from Chicago to Crestline, by way of the Pittsburgh, Fort Wayne and Chicago railroad, having previously purchased a passenger ticket entitling him to be thus carried. The price paid for the sleeping-car ticket was \$1.50. The train to which the sleeping-car was attached left Chicago about nine o'clock in the evening, and arrived at Crestline between seven and eight o'clock next morning. As appellee first entered the sleeping-car, he exhibited his ticket to the porter of the car, who went into the car with him and showed him his berth. He seems shortly afterward to have gone into the water-closet, and, upon returning, he took off his overcoat and boots, sat down, and engaged in reading until the conductor of the sleeping-car came around for tickets. He then commenced looking for his ticket but was unable to find it. When the conductor came up to him he informed him that he was unable to find the ticket, that he had either lost it or the porter had not given it back to him. He then went to the porter, who replied to his inquiry, that he had not taken the ticket ; that he had seen the ticket, but appellee still held it in his hand. He thereupon returned and inquired of the conductor whether it would make any difference, as the porter had seen his ticket, and was informed by the conductor that he must either have the ticket or the money. Appellee replied to the conductor that he would get a duplicate ticket, if he had time. The conductor informed him that he would have about ten minutes until the train started. He then went to the appellant's agent, from whom he had purchased the ticket, and informed him of his difficulty. The agent expressed himself as being unable to give him a duplicate ticket, because he was charged by the company with all the tickets left with him, but said he would give him an order on the conductor, and then wrote on a slip of paper and gave him, the following :

" Mr. Ziezler (the name of the conductor), this is the gentleman who bought lower 4 to Crestline. If the ticket is presented by any one else, see to it.

" KIRKLAND, Ticket Agent."

Upon receiving this he re-entered the car and handed it to the conductor, who took it without saying any thing, and went himself to the ticket office. After returning, the conductor informed appellee that he could not let him ride on it, saying, " my orders are, I must have the money, a ticket, or a pass, and that is not a pass ; that is an order." Appellee replied : " I propose to ride right here in this berth." The

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conductor answered that there was no use multiplying words, that the company would not accept that as a voucher from him, and that, unless appellee paid him, he should put him out of the car. Appellee replied that he should not go. After the cars had started, some twenty minutes, the conductor again returned and inquired of appellee what he was going to do. Appellee replied that he had paid for the ride and didn't propose to pay again. The conductor said that the company would not accept that as a voucher from him. Appellee observed, that if the conductor had to pay the one dollar and a half he would refund it to him. In reply to this, the conductor said he did not know appellee. When appellee remarked he would do nothing further, the conductor took appellee's boots, coat and satchel from berth No. 4, and carried them into the passenger-car next in front, and, returning, said to appellee, "I will thank you to vacate this car." Appellee again replied that he had paid for a ride and expected to ride there. The conductor then took hold of his collar and led him out of the car, and from there he went into the passenger-car. The next morning about eight o'clock the conductor went to appellee and gave him his original ticket, saying he had found it in the water-closet, and that if appellee would present it to the office in Chicago, he presumed they would pay him back the dollar and a half. Appellee told him he should not sell it so cheaply.

Appellee does not recollect that, in searching for his ticket, he examined the water-closet, but thinks that he otherwise made an ordinarily careful search for it. The conductor used no violence or rudeness toward him, and no offensive language, other than what has been stated. The passenger-car into which he was removed was in nowise objectionable, except that it was a passenger and not a sleeping-car. Appellee suffered no physical injury, and no pecuniary loss whatever, beyond the price of the sleeping-car ticket. While the colloquy was being had between him and the conductor, one of the passengers in the sleeping-car offered to loan appellee the price of the berth, but he declined accepting it, for the reason that he had money and could have paid for the berth if he had chosen to do so.

We are utterly unable, on this showing, leaving entirely out of view the mitigating evidence introduced by appellant, to see upon what hypothesis this assessment of \$3,000 for damages can be justified.

Conceding it to be true, as claimed by counsel for appellee, that under the circumstances, appellee was improperly ejected from the car, we fail to discover sufficient evidence that the act was so willful, malicious or wanton, on the part of the conductor, as to require the imposition of severe exemplary damages. Such damages should, in some degree, be

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proportioned to the magnitude and character of a wrong done. The punishment here does not fall upon the employee, by whose alleged wrongful act the appellant's liability is fixed, but upon the stockholders of the company. There is no evidence that shows that the conductor had been guilty of previous delinquency, which had been called to the attention of appellant's officers, or that they had knowledge of any thing in his character or qualifications which rendered him unfit for the place he held.

The wrong complained of not only resulted in no serious injury to appellee, but it was not accompanied by aggravating circumstances. No threats of violence and no offensive language have been found in the evidence. There was nothing in the character of the expulsion from the car which tended to humiliate or degrade, unless every expulsion must be held to have that tendency. Appellee's statement that he had bought a ticket entitling him to a berth, and that he subsequently lost it, was not denied, but it was claimed that the loss of the ticket imposed on him the obligation of purchasing another one or of paying the conductor the price in money. Appellee thought the assurances he furnished of his having done what he professed, were sufficient to entitle him to a berth, notwithstanding he could not produce the ticket. The conductor seemed to think nothing but the ticket or the money would enable him to make his returns properly to the company. Here, then, was a mere difference of opinion upon a question about which all persons would not necessarily come to the same conclusion, and neither was willing to yield.

It is well-recognized law, that carriers of passengers may lawfully require those seeking to be carried, to purchase tickets, when convenient facilities to that end are afforded by the carrier, to exhibit them to persons designated by the carrier for that purpose, and surrender them, after securing their seats in the car or other vehicle used for transportation, when required by the person in immediate charge of the transportation. Such requirements cause but little if any inconvenience to the public, and may be indispensable to enable the carrier to protect itself against loss through the knavery of dishonest employees. It was in evidence that appellant's rules required the conductor to take from persons desiring berths, only tickets, passes or money, and the reasonableness of these rules is not and cannot be questioned. There was evidence that another rule of appellant, requiring the conductor, when assigning a berth, to give the passenger a berth check which he was to finally give to the porter of the car, had not always been adhered to; but we do not precisely understand how the disregard by an employee of a company of one rule, and especially when knowledge of that is not brought home to

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those intrusted with the power of removal and appointment of the particular employee, can give the public the right to insist that none of the company's rules for his conduct shall be enforced.

There is no dispute that the conductor was entitled to have from the appellee either a ticket, a pass or money before giving him a berth. We think the better rule is, to require that, where the proof is clear and satisfactory, as it was in the present case, the applicant for the berth has bought his ticket but has lost it, and it is limited to a particular berth and trip, and the circumstances are such that it is reasonably certain the company cannot be defrauded by the ticket being in the hands of another, he should have the berth. But this is not so clear that we can say a company should be punished by large exemplary damages, merely because the employee failed to recognize in the circumstances an exception to the general rule under which he was required to act, for much may be plausibly and forcibly urged against the exception. While the ticket was, by its terms, limited to a particular berth and date, there was nothing upon it by which to designate who was its lawful holder. Any person having it in possession would, *prima facie*, be regarded as its owner, and entitled to the designated berth. It does not conclusively follow that the purchaser of such a ticket at the company's office, merely because he is the purchaser, will use it himself. He may purchase for another, or, purchasing for himself, may subsequently change his mind and sell to another. A contest might thus arise between one claiming the berth because he had purchased the ticket, and another claiming it because he was the owner of the ticket, leaving the company to act at its peril in deciding between them.

It is, doubtless, impossible to adopt rules affecting the entire traveling public, which, in their impartial execution, will not, sometimes, incommode and annoy those whose intentions are honest, and who, aside from any code of restrictive rules or regulations, would deal fairly with the carrier. It is only because experience teaches that all, as well those employed by carriers as others, are not thus inclined, that such rules and regulations become necessary; but when it is conceded they are necessary, it follows that they should be enforced upon all alike. He who intends no wrong is not warranted in the assumption that the mere reasonable enforcement of such rules or regulations is, in any sense, personal to himself, nor ought he to expect that any exception will be made in his favor, merely because of his conscious integrity.

In the present case, appellee seems to have conceived some personal indignity was intended to himself, and this view must have been strongly impressed on the jury. We do not so understand the evidence. We

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understand that an employee was simply endeavoring to comply with a reasonable regulation of the company by which he was employed, but that in doing so, he erred in judgment on a question about which he might well honestly be mistaken.

Under the circumstances, we are of opinion appellee is only entitled to recover the price paid for his ticket, and a reasonable compensation for the trouble and inconvenience he suffered by being deprived of his berth in the sleeping-car.

The judgment is reversed and the cause remanded.

Judgment reversed.

DELAHANTY, appellant, v. WARNER.

(75 Ill. 185.)

Officer — remedy of, for unlawful removal.

A city officer cannot maintain a bill in equity to enjoin the corporate authorities from unlawfully removing him or appointing a successor, as he has a complete remedy at law.

BILL for an injunction. The opinion states the case.

McCulloch, Stevens & Wilson, for appellant.

J. S. Starr, and *Lee & Quinn*, for appellees.

SCHOLFIELD, J. Appellant was superintendent of streets in the city of Peoria, and he alleges, by his bill, that he was unlawfully removed from his office, and prays that the aldermen and mayor of the city may be enjoined from appointing a successor, and from interfering with him in any way in the discharge of his duties as street commissioner.

The court below dissolved the temporary injunction which had been issued, and dismissed the bill for want of equity.

In this we perceive no error. Appellant's remedy was complete at law. High on Injunctions, § 781. If he was not properly removed, and a successor cannot therefore be legally appointed, the question can be settled by *quo warranto* against the person claiming to be his successor in office. *People ex rel., etc. v. Forquer*, Breese (Beecher's ed.), 104; *People, etc. v. Matteson*, 17 Ill. 168.

By *mandamus*, the mayor and aldermen may be compelled to restore to

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him any evidence of his right to the office, or any property pertaining thereto which they may have improperly withheld from him. *People ex rel., etc. v. Head*, 25 Ill. 325; *People ex rel. v. Kildruff*, 15 id. 492; *People ex rel. v. Hilliard*, 29 id. 414. And where the title to the office is not in dispute, *mandamus* will lie to restore the person entitled to it. *Street v. County Commissioners*, Breese (Beecher's ed.), 50; *People v. Stevens*, 5 Hill, 616. Nor can there be any doubt of appellant's having a complete remedy at law for any fees or emoluments pertaining to the office of which he may have been unlawfully deprived by the action of the mayor and aldermen.

The court below, however, in dismissing the bill, ordered the payment of one hundred dollars, as solicitor's fees, to appellees, and there is no evidence preserved in the record justifying this order. We have held that this must be done, and that it is error to make an allowance for solicitor's fees on the dissolution of an injunction, except upon evidence showing that services of the solicitor were actually rendered, and that they were, in value, equal to the amount ordered to be paid. *Albright et al. v. Smith et al.*, 68 Ill. 181.

The order allowing the solicitor's fees will be reversed, and the decree in all other respects must be affirmed. The costs in this court will be equally divided between the parties.

Reversed in part.

 GLICKAUF, appellant, v. MAURER.

(75 Ill. 289.)

Landlord and tenant — lease of part of building — liability of landlord for negligence.

Defendants — the owners of a building — leased the lower story thereof to the plaintiff, but occupied the upper story themselves. They employed a carpenter to put a skylight in the roof which he did so negligently that the rain came through and damaged plaintiff's goods. *Held*, that the defendants were liable therefor. (*See note*, p. 240.)

ACTION on the case. The opinion states the case.

Hervey, Anthony & Galt, for appellants.

E. F. Allen, for appellee.

CRAIG, J. In May, 1872, appellee was the tenant of appellants. He

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had a lease of and occupied the first story of No. 118 West Washington street, Chicago, as a wholesale and retail cigar store. The building, which was a two-story frame, and two others of the same kind adjoining, were owned by appellants. The second story of the building was in the possession and control of appellants. A short time before the injury complained of appellants contracted with a carpenter to put skylights in the roofs of each of the buildings. Under the contract the carpenter was to do the work for a certain stipulated price. The work was commenced on Thursday, the 24th day of May, by the carpenter, and all the carpenter work finished by Saturday noon following. The carpenter had an arrangement with the roofers to be there on Saturday, on the completion of the carpenter work, and close up the openings; but they failed to come, and the building was left exposed over Sunday. On Saturday night a violent rain storm came, and in consequence of the roof of the building being open, appellee's store was flooded and his stock of goods seriously damaged.

He brought an action against appellants, and recovered a verdict and judgment, to reverse which they have prosecuted this appeal.

It is clear from the evidence that, if appellants, or the carpenter in charge of the work, had used that degree of diligence and care they should have done, the work could have been completed in ample time to have protected appellee from any loss or damage.

The work required to be done could have been completed in a short time, and no reasonable excuse was shown for leaving appellee's goods exposed to rain, as they were.

It is, however, urged that no legal liability attaches to appellants, as they had let the contract for doing the work to an independent contractor who had the sole and entire control of the work; and, in support of this position, we have been referred to the case of *Scammon v. The City of Chicago*, 25 Ill. 424, where it was held that an owner of land who contracts with a builder to erect a building upon it, and surrenders the entire possession of the premises, is not liable for an accident by which a stranger is injured through the negligence of the contractor or his servants.

The rule announced in that case is no doubt the correct one; but it has no application to the facts disclosed by the record before us. In this case, appellants employed a carpenter to put in the three buildings some three or four skylights, and they were to pay him for the job \$10 or \$12 for each. It is true, the carpenter testified he had the entire control of the work: but that fact can make no difference. There was no such surrender of the entire possession of the premises to the workmen as could relieve appellants of responsibility.

The arrangement made amounts merely to this: Appellants employed a mechanic to make certain repairs upon a building, a portion of which was occupied by appellee as tenant of appellants. In making the repairs the mechanic can only be regarded as the servant of appellants, and we see no reason why they should not be held responsible for the negligence of the mechanic in doing the work.

It would be a strange doctrine, indeed, to hold that appellants could lease the first story of a building to appellee and receive the rent, and then employ a carpenter to remove the roof, in consequence of which a valuable stock of goods should be destroyed, and then take refuge behind the men they had caused to do an act from which the damages resulted.

It is true, the second story of the building was in the possession of appellants, and appellee could not direct or control its use, and appellants had the right to use it as they saw proper; but they had no right to use it in such a manner as to injure appellee; and if, through negligence, the want of reasonable care or skill on the part of appellants, or their servants, appellee has been injured, they must respond in damages.

It is claimed the court erred in refusing to permit one of appellants to testify that they had let the contract to do the work to an independent contractor, who had the entire control of the work.

The substance of the offered proof was already before the jury by the evidence of the carpenter, and while we see no objection to the offered evidence, yet, had it been admitted, the result could not have been otherwise than it was, and we cannot for this error reverse.

It is claimed the damages are excessive. The amount of damages sustained by appellee to his goods was purely a question of fact for the jury. We have, however, carefully examined the evidence, and fail to find that the verdict is larger than the facts proven warrant.

The judgment will be affirmed.

Judgment affirmed.

NOTE.—See *Doupe v. Genin*, 6 Am. Rep. 47; *Gill v. Middleton*, 7 id. 548; *Marshall v. Cohen*, 9 id. 170; *Shipley v. Fifty Associates*, 8 id. 318.

A tenant of lower rooms can maintain an action against his landlord who occupies upper rooms in the same building for damages to his property through leakage of injurious substances from the upper to the lower rooms caused by the negligence of the landlord and want of repair, notwithstanding the absence of any covenant on his part to keep in repair. *Stapenhorst v. American Manuf. Co.*, 46 How. Pr. 510; 8 C., 15 Abb. (N. S.) 355.—*Rep.*

Philpot v. Taylor.

PHILPOT, appellant, v. TAYLOR.

(75 Ill. 309.)

Action for damages for contracting to sell property without authority.

Defendants, falsely pretending to have authority to sell plaintiff's land, made a contract to sell to a third party. *Held*, that they were liable to plaintiff for his costs and expenses incurred in defending a suit by such third party for specific performance of the contract.

ACTION for damages. The opinion states the case.

Grant & Swift and H. S. Monroe, for appellant.

Ayer & Kayles, for appellee.

BREESE, J. This was case, in the Superior Court of Cook county, by Abner Taylor, against Bryan Philpot and Henry E. Pickett, for falsely pretending to be the agents of plaintiff to sell certain real estate belonging to him, in the city of Chicago, and, under that pretense, entering into a contract with one Merrill to sell the premises to him, which contract they caused to be recorded in the proper office in Cook county, and to enforce which, Merrill filed a bill in chancery against the plaintiff, by means whereof plaintiff was put to great charges and expenses in defending the same, and for attorneys' fees on appeal, and for printing abstracts and briefs, to his damage five thousand dollars.

The cause was tried by a jury on the general issue, resulting in a verdict for the plaintiff for fourteen hundred sixty-seven dollars sixty-three cents. A motion for a new trial was denied, and judgment rendered on the verdict, to reverse which, defendants appeal, and raise several questions, all of which we have considered.

Appellants make the point that the action cannot be maintained, because the damage complained of is too remote from the alleged cause. Many authorities are cited on this point, which do not seem to have any direct bearing on the proposition arising out of the facts of this case. It is argued it did not follow, by means of making the contract complained of, that Merrill would institute suit for a specific performance. This, in the ordinary course of business, was reasonably to have been expected; and defendants are charged with placing it in the power of Merrill to bring such action, to defend against which, heavy expenses were incurred. This is the very *gist* of this action.

The rule, as found in the text-books, is, that whosoever does an illegal wrongful act is answerable for all the consequences in the ordinary and natural course of events, though these consequences be directly

brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer; or, provided their acts, causing the damage, were the necessary or legal and natural consequences of the original wrongful act. Here, Merrill was the intervening agent, who was set in motion by these pretended agents — the appellants, the original and primary wrong-doers. Had they not given the contract, there would have been no chancery suit, by Merrill, to compel performance. A case is referred to from 80 L. J. Q. B. 137, *Dixon v. Fourcoy*, where it was held, if the natural result of a wrongful act, committed by a defendant, has been to plunge the plaintiff into a chancery suit, and thereby to cause him to incur costs and expenses, whatever may be the event of the suit, there is that conjunction of wrong and damage which will give the plaintiff good cause of action.

But we need not go beyond our own court for authority on this point. In *McEwen v. Kerfoot*, 87 Ill. 530, which was assumpsit by Kerfoot against McEwen, to recover his commissions on a sale of land made by plaintiff for defendant, and at his request, the special plea sought to set off and liquidate damages arising out of the subject-matter of the suit, growing out of the alleged fact of want of authority in the agent to make the contract, and thereby embarrass his principal by giving the purchaser a written contract, to be reduced to record, and drawn upon a basis which his principal had refused to accept. It was held that the principal had the right to set off any damages he incurred in consequence of the execution of the written contract, against the claim set up by the agent for his commissions in making the sale, after he was advised his principal had repudiated the sale.

To the same effect is *Himes v. Keighlingher*, 14 Ill. 469. Here, as in that case, the declaration counts upon a malfeasance, for an affirmative wrongful act. It is for the tortious act of defendants, and to recover for the trouble and expenses necessarily incurred to get rid of the effects of this audacious act. It cannot be said these expenses were not the reasonable result of defendants' conduct.

[The other questions were not important.]

Judgment affirmed.

City of Quincy v. Jones.

CITY OF QUINCY, plaintiff in error, v. JONES.

(76 Ill. 231.)

Lateral support of land adjoining street. Municipal corporations — liability for changing grade of street.

Municipal corporations, while acting within the scope of their municipal authority in making excavations in streets for the purpose of opening and improving them, are not liable to the owners of abutting property for injuries to buildings erected thereon, resulting from the removal of the lateral support of the soil.

The owner of property adjoining a street can acquire no prescriptive right as against the municipal corporation, to the lateral support of the soil of the street. (See note, p. 251.)

ACTION on the case by Laura Jones and others against the City of Quincy to recover damages for carelessly and negligently making a deep cut in a street adjoining plaintiff's land whereby a house thereon became undermined and of little value and had to be removed, and the land caved in, etc. There was a count alleging that said plaintiffs had occupied said premises adjoining said street for more than twenty years, and that the earth in said street was and had been during all that time the lateral support of said house and premises.

Plea of not guilty. The trial resulted in a verdict for plaintiff and judgment for \$2,000 thereon. The city appealed.

Skinner & Marsh, for plaintiff in error.

Wheat & Marcy, and *Warren, Wheat & Hamilton*, for defendants in error.

SCHOLFIELD, J. The several errors assigned upon the rulings of the court below present, in our opinion, but two material questions :

First. Are municipal corporations, while acting within the scope of their municipal authority in making excavations in streets for the purpose of opening or improving them, liable to property owners for injuries to buildings erected on lots abutting on the streets, resulting from the removal of the lateral support of the soil in the streets ?

Second. Does the owner of a city lot, abutting on a public street, acquire a prescriptive right to have the buildings and structures on such lot sustained by the lateral support of the soil in the street, by the mere failure of the city to remove the soil within such time as would, in a proper case, afford evidence of a prescriptive right against an individual ?

In *Nevins v. Peoria*, 41 Ill. 507, which was an action on the case for negligence in grading a street, whereby the flow of water was diverted from its natural channel, and thrown on the plaintiff's property, this general principle, equally applicable to the present case, was announced

"The city is the owner of the streets, and the legislature has given it power to grade them; but it has no more power over them than an individual has over his land, and it cannot, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property, in a mode that would render a private individual responsible in damages, without being responsible itself."

In support of the rulings of the court below, defendants in error insist that it is a well-settled rule of law, that the owner of land has a right to have the soil of his premises sustained by the lateral support of the natural soil of the adjoining land, and they cite *Humphries v. Brogden*, 12 Q. B. 743; *Thurston v. Hancock*, 12 Mass. 229; *Farrand v. Marshall*, 21 Barb. 409; Rolle's Abr. 665. An examination of these authorities, however, will show that this right of lateral support is limited to the soil in its natural state, and that it does not extend to the support of any additional weight which the owner of the soil may place upon it.

The reference found in Rolle is this: "If A be seized in fee of land next adjoining the land of B, and A erect a new house on the confines of his land next adjoining the land of B, and if B afterward dig his land so near the foundation of A's house, but no part of the land of A, that thereby the foundation of the house and the house itself fall into the pit, yet no action lies by A against B, because it was A's own fault that he built his house so near to B's land, for he, by his act, cannot hinder B from making the best use of his own land that he can. But *semble*, that a man who has land next adjoining my land, cannot dig his land so near mine, that thereby my land shall go into his pit; and, therefore, if the action had been brought for that, it would lie."

The facts in *Thurston v. Hancock* were, briefly, these: In 1802, the plaintiff purchased a lot upon Beacon Hill, in the city of Boston, and in 1804 built a valuable house on it within two feet of his line. In 1811 the defendant became the owner of the adjoining lot, and began to dig down the hill, and had dug within five or six feet of the plaintiff's lot, when the earth gave way and exposed the foundations of plaintiff's house, and he had to take it down. The court held that the plaintiff was without remedy for the injury to his house, saying: "A man, in digging upon his own land, is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor. If he digs too near his line, and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequence of his act, and not for the value of a house put upon, or near, the line by his neighbor. For in so placing the house, the neighbor was in fault, and ought to have taken better care of his

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interest. * * * He built at his peril, for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. * * * For the loss of or injury to the soil merely, his action may be maintained. The defendants should have anticipated the consequences of digging so near the line, and they are answerable for the direct consequential damage to the plaintiff, although not for the adventitious damages arising from putting his house in a dangerous position."

Humphries v. Brogden was an action for injury to plaintiff's land by the removal of the minerals under the surface, so that the land subsided, cracked, and was materially injured. Lord CAMPBELL, after reviewing the English cases upon the subject, among other things, said: "Where there are separate freeholds, from the surface of the lands and the minerals belonging to different owners, we are of the opinion that the owner of the surface, while *unincumbered by buildings, and in its natural state*, is entitled to have it supported by the subjacent mineral strata."

Farrand v. Marshall simply decides, that a man may dig on his own land, but not so near that of his neighbor as to cause the land of the latter to fall into the pit, and is not in conflict with the rule that the owner of a building, in the absence of a grant or prescriptive right, is not entitled to have it sustained by the lateral support of his neighbor's soil. After a somewhat extended and careful examination, we have been unable to find any serious conflict in the decisions, either English or American, on this particular question, and, therefore, deem it necessary to refer to but a few additional cases in its further elucidation.

In *Panton v. Holland*, 17 Johns. 92, plaintiff was the owner of a house and lot in the city of New York, and the defendant, in erecting a house on an adjacent lot, in order to lay the foundation, dug some distance below the foundation of the plaintiff's house, in consequence of which one of the corners of the plaintiff's house settled, the walls were cracked, and the house, in other respects, injured. It was held that the plaintiff was not entitled to recover, unless on the ground of negligence in the defendant in not taking reasonable care to prevent the injury.

In *Lasala v. Holbrook*, 4 Paige, 169, complainants were seized of certain lots in the city of New York, on which was a church, erected many years before the filing of the bill. The defendant was the owner of an adjoining lot, and commenced the erection of a building which was intended to cover the whole lot, and to be six stories high. He was sinking the foundations of the building sixteen feet below the natural surface of the ground, and ten feet lower than the foundation of the church. It was claimed that, by excavating the lot in this manner, the defendant

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would greatly endanger the church; that one corner of the walls thereof, opposite which the excavation had been completed, had settled so as to leave a crack in the wall, and it was prayed that the defendant be enjoined from making the excavation.

Chancellor WALWORTH said: "I can readily believe, from the nature of the soil, and from the great depth of the defendant's intended excavation, below the foundation of the church, that the complainants' fears for the safety of their building are not entirely groundless. * * * It is not, however, alleged in the bill that the defendant is proceeding to improve his property in an unreasonable or unusual manner, or with any intention of injuring their wall or building. * * * I have a natural right to the use of my land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots; and the owners of those lots will not be permitted to destroy my land by removing this natural support. * * * But my neighbor has the right to dig the pit upon his own land, if necessary to its convenience and beneficial use, when it can be done without injury to my land in its natural state. I cannot, therefore, deprive him of this right by erecting a building on my lot, the weight of which will cause my land to fall into the pit which he may dig in the proper and legitimate exercise of his right to improve his own lot." And it was held that the complainants were not entitled to relief.

In *O'Connor v. Pittsburgh*, 18 Penn. 187, a church had been built according to the direction of the city regulator, and by a grade previously established. Afterward, in pursuance of an ordinance, the grade of the street was reduced seventeen feet, and the church had to be taken down and rebuilt at a cost of \$4,000. It was held that the plaintiffs were not entitled to damages. The court say: "We had the case reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled, not only by Pennsylvania, but by every decision in the sister States except one."

The exception alluded to is Ohio, where it has been held that a party whose property has been injured by a change in an established grade of a street, is entitled to recover. But even the rule, as held in that State, is not consistent with the claim here made for defendants in error. In the *City of Cincinnati v. Perry*, 21 Ohio St. 499, suit was brought for injuries to the dwelling-house of the plaintiff, which was situated on a lot abutting on an alley, by reason of the construction of a public sewer in the alley by the defendant. The jury found specially that the defendant, in making the sewer, excavated to the depth of thirteen feet that the plaintiff's building was injured by reason of the excavation;

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that all reasonable and ordinary care was taken, in making the sewer, to avoid injury to plaintiff's property; that plaintiff's foundation was about four feet in the ground, and was suitable for sustaining such a structure at the time of its erection. The court say: "At the time the house was built, and for many years before that time, Berden Alley, by the laws of this State, was in the possession, and under the control, of the city, for the purpose of drainage; and sewerage was a legitimate mode of drainage, within the scope of its authority. Before the plaintiff below built his house, the city had not, in any manner, as far as the record shows, indicated the nature or extent of drainage by sewers or otherwise, that would be required for the public use. The plaintiff, without exercising any judgment or discretion as to the reasonable and proper future use of the alley for sewerage purposes, erected his house on a foundation suitable only for sustaining such a structure at the time, and under the then existing condition of the alley. This was his own wrong, and he has no right to complain of an injury from the construction of the sewer (which was built in a proper manner), having neglected, on his own part, to exercise reasonable care."

In *Nevins v. Peoria*, *supra*, this court, in discussing the question then before it, said: "A man cannot do any thing upon his own soil, under the plea of ownership, which amounts to a nuisance, and works injury to his neighbor, but within that limit he may do whatever his whim may dictate. He may excavate to any depth, or raise the surface to any height, and the neighboring owner has no right to complain, because his enjoyment of his own lot is not thereby prejudiced. Even if a building erected by me near the boundary of my lot is injured or endangered by an excavation made by my neighbor in his premises, I cannot complain, because I have no right to the use of his soil for the support of my building." See also, to the same effect, *Mamer v. Lussem*, 65 Ill. 484. But counsel argue that the rule recognized by these cases might do well enough in the rural districts, where such questions rarely arise, but that it totally fails to meet the necessities arising in cities.

For precisely the same reason the distinguished jurist who delivered the opinion in *Radcliffe's Exrs. v. The Mayor, etc., of Brooklyn*, 4 N. Y. 197, claimed that Chancellor Walworth went too far in *Lasala v. Holbrook*, *supra*, in following the dictum in Rolle's Abridgment, and holding that even the soil in its natural state was entitled to the lateral support of the adjacent soil, when this was essential. He said: "If the doctrine were carried out to its legitimate consequences, it would often deprive men of the whole beneficial use of their property. An unimproved lot of land in the city of Brooklyn would be worth little or

nothing to the owner, unless he were allowed to dig in it for the purpose of building; and if he may not dig because it will remove the natural support of his neighbor's soil, he has but a nominal right to his property, which can only be made good by negotiation and compact with his neighbor. A city could never be built under such a doctrine. I think the law has superseded the necessity for negotiation, by giving every man such a title to his own land that he may use it for all the purposes to which such lands are usually applied, without being answerable for consequences, provided he exercise proper care and skill to prevent any unnecessary injury to the adjoining land-owner. The saying of Rolle may have been a wise one in his day, but it is not well adapted to our times." This we quote simply as giving the extreme view of the other side of the question, and it would seem to be quite as plausible as that of defendants in error. The more reasonable rule, however, and the one best sustained by authority, lies, in our opinion, between these extremes, and is that declared by the preceding cases to which we have referred. I have the right to use my land in such reasonable way as my judgment shall dictate, either by making excavations or superstructures thereon, subject, however, to the implied condition that I shall not thereby interfere with my neighbor in the enjoyment of the same right in respect to his adjacent land. Each is entitled to have his soil, in its natural state sustained, when necessary, by the lateral support of the adjacent soil of the other; but neither has the right to burden such support by any additional weight, because this would, to that extent, appropriate the use of the property of the one, to the benefit of the other.

No danger is to be apprehended from malicious or capricious excavations, to be made as a mere means of injury or annoyance to an adjacent owner of the soil, for this is inconsistent with a reasonable and legitimate use of property, and such an excavation would not be within the protection of the rule. Moreover, it is required of the owner of the soil, having the right to excavate notwithstanding there are buildings upon the adjacent soil, that he shall exercise the right with reasonable skill and care, in view of the character of the buildings and the nature of the soil, so as to avoid doing unnecessary injury to the buildings. *Foley v. Wyeth*, 2 Allen, 181; and whether reasonable skill and care have been exercised, in view of all the circumstances in a given case, is a question of fact for the jury.

If injury is sustained to a building in consequence of the withdrawal of the lateral support of the neighboring soil, when it has been withdrawn with reasonable skill and care to avoid unnecessary injury, there can be no recovery; but if injury is done the building by the careless and negli-

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gent manner in which the soil is withdrawn, the owner is entitled to recover to the extent of the injury thus occasioned.

What has been said applies only to cases where the owner of the soil has no other right to the lateral support of the adjacent soil than results from the naked ownership of the soil, and does not apply where there is a valid right to burden the adjacent soil with the claim of lateral support resulting from contract or prescription.

Where a common owner of the soil originally held both parcels, that on which the plaintiff's house was built, and that which the defendant subsequently excavated, it is held the defendant is charged with the duty of supporting, not merely the soil, but the house of plaintiff's parcel. *Harris v. Ryding*, 5 M. & W. 71; *McGuire v. Grant*, 1 Dutch. 356. Likewise, where the buildings are ancient, or those which have been erected on ancient foundations, and which, by prescription, are entitled to the special privilege of being exempted from the spirit of reform, the owner is said to be entitled to full protection against the consequence of any new excavation. *Hide v. Thornborough*, 5 Car. & K. 250; *Story v. Odin*, 12 Mass. 157; *Lasala v. Holbrook*, *supra*. No claim is made that the present case falls within the first exception, but it is argued that it is within the last, and this brings us to the second question in the order of the argument.

Blackstone says, in Sharswood's Ed., vol. 2, p. 263: "A prescription cannot be for a thing which cannot be raised by grant, for the law allows prescriptions only in supply of the loss of a grant, and, therefore, every prescription presupposes a grant to have existed."

The platting of the streets was a solemn dedication of the ground thus embraced to the corporation, for the uses and purposes of the public. *Canal Trustees v. Haven*, 11 Ill. 555; *Hunter v. Middleton*, 13 id. 54. "They were dedicated to the public for particular purposes, and only for such purposes can they be rightfully used. For those purposes the city may improve and control them, and adopt all needful rules and regulations for their management and use, but she cannot alien or otherwise dispose of them." *City of Alton v. Transportation Company*, 12 Ill. 60.

It is the unquestioned duty of the city, in controlling and improving the streets, to prepare them for public use, as streets, at such time and in such manner as the public necessities may require. Holding them in trust for the public and having no authority to convey or divert them for other uses, it would seem inevitably to follow that they can have no power to grant to individuals rights or easements in the street which might in any way interfere with the duty of preparing them for the public use, to meet the public necessities; for it is obvious that if such

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rights may be granted, then the practical use of the streets may become so burdened with private rights as to place it beyond the pecuniary ability of the city to discharge its duty to the public, with reference to them. It is not consistent to say that the city owes a duty to the public, and yet that it may voluntarily place it beyond its power to discharge that duty.

In *Goszler v. Corporation of Georgetown*, 6 Wheat. 593, claim was made for injury to plaintiff's property by reason of a change of the grade in the street, and it was insisted that a promise had been held forth by the corporation to all who should build on the graduated streets, that the graduation should be unalterable. Chief Justice MARSHALL, in delivering the opinion of the court, said: "But it cannot be disguised that a promise is held forth to all who should build on the graduated streets, that the graduation should be unalterable. The court, however, feels great difficulty in saying that this ordinance can operate as a perpetual restraint on the corporation. When a government enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its Constitution. A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract which should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a by-law which the legislature enables it to enact, may well be questioned. We rather think that the corporation cannot abridge its own legislative power."

In *Smith v. Corporation of Washington*, 20 How. 135, the same question was again before the Supreme Court of the United States, and the court, per Mr. Justice GRIER, said: "Streets cannot be opened and kept in repair, or made safe or convenient for public use, without being made level, or as nearly so as the nature of the ground will permit. Hills must be cut down and hollows filled up, or, in other words, the road must be 'graded,' or 'reduced to a certain degree of ascent or descent, which is the proper definition of the verb,' 'to grade.' If the duty imposed on the corporation requires this to be done, the power must be co-extensive with the duty. If charged with neglect of their duty, as public officers, bound to keep the streets in repair, it would not be a sufficient excuse to allege that the fences and obstructions are removed, and, therefore, the street is opened, or that it has been kept in as good 'repair' as it was found. A Court of Quarter Sessions would probably not receive a defense founded on such astute philological criticism of the terms of the statute; nor could the allegation be admitted that having once fixed the grade which is now found improper and insufficient, the corporation has exhausted its power, and has no authority to change the level or grade, in order to keep the street in repair. As the duty is a continuing one, so is the power necessary to perform it."

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Says Dillon (Mun. Corp., § 541): "The fundamental idea of a street is not only that it is public, but public for all purposes of free and unobstructed passage, which is its chief and primary but by no means sole use."

Other authorities bearing upon the question might be referred to, but we deem it unnecessary. If the simple proposition were submitted, has a municipal corporation power to grant to the abutting property-holders on an unimproved street the lateral support of the soil in the street, to the most ordinary apprehension it would but present, in another form, the question, may a municipal corporation, by contract with private parties, bind itself, through all time, not to improve a public street? It is not claimed that, by the charter of Quincy, such unusual and extraordinary powers are conferred; and, under the ordinary powers to lay out, open and repair streets, the idea is, in our opinion, preposterous.

We must, then, hold that defendants in error can claim no right to the lateral support of the soil in the street, by prescription, because it is impossible that they could have obtained such right by grant.

Moreover, it seems well settled that an adverse right to an easement cannot grow out of a mere permissive enjoyment for any length of time; and that is all that defendants in error claim to have had. *First Parish in Gloucester v. Beach*, 2 Pick. 60, note; *Medford v. Pratt*, 4 id. 222, 228; *Parker v. Framingham*, 8 Metc. 260; *Thomas v. Marshfield*, 13 Pick. 240.

Inasmuch as the rulings of the court below were not in harmony with the views we have expressed, the judgment must be reversed and the cause remanded.

Judgment reversed.

NOTE.—See *Mitchell v. Mayor*, 15 Am. Rep. 669, wherein it was held that the owner of a building erected on the line of his lot cannot, by lapse of time, acquire a prescriptive right to the lateral support of the adjacent soil.—REP.

WHITE, appellant, v. SMITH.

(77 Ill. 351.)

Promissory note — negotiability.

A promissory note to a corporation or order was expressed to be paid "in such installments and at such times as the directors of said company may from time to time assess or require." *Held*, negotiable.

ACTION on a promissory note. The opinion states the case.

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S. R. Reed, P. A. Hamilton, and A. J. Gallagher, for plaintiff in error

C. W. Fairbanks, G. W. Gere, and J. C. Black, for defendant in error.

SHELDON, J. This was an action, brought by plaintiff below, as assignee, upon the following instrument in writing :

"\$50.00

MONTICELLO, ILL., *April* 17, 1866.

For value received, I promise to pay to the Monticello Railroad Company, or order, the sum of \$50, to be paid in such installments and at such times as the directors of said company may, from time to time, assess or require.

J. W. WHITE."

The declaration averred that the directors, on the 1st of June, 1866, made an assessment of five per cent, which was paid ; on the 7th of May, 1867, another assessment of ten per cent, which was paid ; on the 7th of January, 1868, another assessment of thirty-five per cent, of which there was notice to defendant, demand and refusal of payment ; and that, on January 6, 1869, another assessment of fifty per cent was made, and like notice, demand and refusal of payment, the several assessments amounting to the whole sum of money in the instrument mentioned, and that afterward the instrument was indorsed and assigned to the plaintiff.

The court below overruled a demurrer to the declaration and rendered judgment for the plaintiff.

The error assigned is the overruling of the demurrer, and the question made is, whether the instrument in suit is a negotiable promissory note.

Plaintiff in error asserts it not to be, because, by its terms, it is uncertain whether the money will ever become payable or not ; that the payment depended on an act to be performed by the directors, which act might never be performed by them, or that the railroad company, from some cause, might cease to exist before any assessment had been made by the directors.

The principle is undoubted, that, to constitute a valid promissory note, it must be for the payment of money which will certainly become due and payable one time or other, though it may be uncertain when that time will come. And where the payment depends upon a contingency, it will make no difference that the contingency does, in fact, happen afterward, on which the payment is to become absolute, for its character as a promissory note cannot depend upon future events, but solely upon its character when created.

The instrument in question does, seemingly, depend for its payment upon a contingency. But there is a class of cases, says Judge STORY,

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"which, at first view, seem to import that payment is to be made only upon the occurrence of events which may never happen, and yet which are uniformly held to be absolutely payable at all events. Thus, if a note be made payable at sight, or at ten days after sight, or in ten days after notice, or on request or on demand, in all these and the like cases the note will be held valid as a promissory note and payable at all events, although, in point of fact, the payee may die without ever having presented the note for sight, or without having given any notice to or made any request or demand upon the maker for payment. But the law, in all cases of this sort, deems the note to admit a present debt to be due to the payee, and payable absolutely and at all events, whenever or by whomsoever the note is presented for payment according to its purport." Story on Prom. Notes, § 29.

We are inclined to hold that this instrument may be regarded as one falling under this class. The money here is payable to the company in such installments and at such times as its directors may from time to time require. The directors are the managing officers of the corporation, so that the money is really payable in such installments and at such times as the payee may require. It was, in effect, payable on demand, or in installments on demand. In the case of a note payable "on having twelve months' notice," it might be said that it was not certain that notice would ever be given. In reference to a note so payable "on having twelve months' notice," ABBOTT, C. J., in *Clayton v. Gosling*, 5 Barn. & Cresw. 360, said: "Nor is the time of payment contingent, in the strict sense of the expression, for that means a time which may or may not arrive. This note was made payable at a time which we must suppose would arrive." The same, we think, with equal truth, may be said in respect to the present note.

We cannot well distinguish, in principle, this case from the one of *Goshen Turnpike Co. v. Hurtin*, 9 Johns. 217. The promise there was, to pay the company \$125 for five shares of the capital stock of the corporation, in such manner and proportion and at such time and place as the president, directors and company should from time to time require. It was held that the note was a good promissory note within the statute, the statute there, relative to promissory notes, being the same in substance as that of 3 and 4 Anne; that the note was payable absolutely, and not depending on any contingency; that it was, in effect, payable on demand. See, also, *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 236.

We are disposed to hold that there was no error in overruling the demurrer, and the judgment will be affirmed.

Judgment affirmed.

People ex rel. Brackett v. McGowan.

PEOPLE *ex rel.* BRACKETT v. MCGOWAN.

(77 Ill. 644.)

Naturalization — evidence to impeach record of — jurisdiction.

Parol evidence is not admissible to impeach the record of naturalization by showing that the preliminary steps were not taken

A court of record having common-law jurisdiction of a certain class of cases and a seal and a clerk, has "common-law jurisdiction," and can admit aliens to citizenship under the act of Congress.

INFORMATION in the nature of *quo warranto*. The opinion states the facts.

C. W. & E. L. Thomas, for appellants.

G. & G. A. Kaerner, for appellee.

SCOTT, C. J. The information alleges Daniel McGowan, at an election held on the 8th day of October, 1874, was regularly elected judge of the City Court of East St. Louis; was duly qualified as judge, and entered upon the discharge of the duties of the office; but charges he could not lawfully hold the office of judge of that court, because he was alien born.

The plea filed admits defendant was born an alien to the United States, but avers he was duly naturalized on the 15th day of May, 1867, in the Criminal Court of the county of St. Louis, at a regular term, that court having jurisdiction to admit aliens to citizenship.

Two replications were filed—first, the Criminal Court of the county of St. Louis had not jurisdiction to naturalize defendant, and second, *null tiel record*, upon which issue was joined.

An exemplification of the record was offered in evidence, which shows Daniel McGowan, a native of Ireland, applied to become a citizen of the United States, at the May term, 1867, of the Criminal Court of the county of St. Louis, and it appearing he had resided in the United States, and in the State of Missouri, for the requisite length of time, and had complied with the law in all preliminary matters, he was admitted to citizenship, on taking the usual oath of allegiance to this government.

On the trial, the people offered to prove defendant, prior to May 15, 1867, had made no declaration of his intention to become a citizen; that he immigrated to the United States after he was twenty-one years of age; that he had never served in the army or navy of the United States, and that he had not resided in the State of Missouri one

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year previous to his application to become a citizen, which evidence was excluded by the court.

In the exclusion of this testimony, the court ruled correctly. The record of naturalization of an alien, like any other record of a court, imports verity. It cannot be impeached for fraud unless that defense has been specially pleaded, setting forth in what the fraud consists. No replication had been filed alleging fraud, nor that the court had not jurisdiction of the person of the defendant. The replication as to jurisdiction is, that the court did not have jurisdiction of the subject-matter, but does not put in issue the jurisdiction of the court as to the person of defendant; hence, the evidence was properly rejected. But had the issue been made by the pleadings, we are still of opinion the evidence was inadmissible. It seems clear, both on principle and authority, a record of naturalization, made by a court of competent jurisdiction, cannot be impeached, in a collateral proceeding, by showing that the preliminary steps required by law have not, in fact, been taken. It is upon the principle such a record, like any other judgment of a court, affords complete evidence of its own validity. In proceedings of naturalization, matters are submitted to the decision of the court, and the presumption will be indulged the court heard evidence, was satisfied the applicant had complied with the law, and its findings must be held conclusive as to all facts recited in the record. *Spratt v. Spratt*, 4 Peters, 393; *The People v. Pease*, 30 Barb. 588; *Campbell v. Gordon and Wife*, 6 Cranch, 176; *McCarthy v. Marsh*, 1 Seld. 263.

But the principal question in the case is, whether the Criminal Court of the county of St. Louis had jurisdiction to admit aliens to citizenship. Under the act of Congress, any State court, being a court of record, having common-law jurisdiction, a seal and a clerk or prothonotary, has jurisdiction in matters of naturalization of aliens. Our inquiry, then, is, whether the Criminal Court of the county of St. Louis comes within the definition of State courts mentioned in the act of Congress on that subject.

The Criminal Court of the county of St. Louis was established by an act of the General Assembly of the State of Missouri, passed in 1855, and was given all the original and appellate jurisdiction which had been vested in the several Circuit Courts of the State. It is a court of record, having a seal and a clerk, and was given all the powers, was to perform all the duties, and be subject to the restrictions of courts of record as such, according to the provisions of the laws of the State. The judge of the court was made a conservator of the peace, with powers to issue writs of *habeas corpus* and determine the same, to administer oaths, take and certify recognizances, and exercise all the powers of an examining

magistrate. Gottschalk's Laws, p. 89. Subsequently, by an act of the legislature, the Court of Criminal Correction in St. Louis county was established, and was given exclusive original jurisdiction of all misdemeanors under the laws of the State of Missouri, committed in the county of St. Louis, the punishment of which is by fine or imprisonment in the county jail, or both, except in cases of assault and battery and affrays, but did not otherwise affect the jurisdiction of the Criminal Court. Gottschalk's Laws, p. 100.

It will be observed the Criminal Court of the county of St. Louis answers, in every particular, the description of State courts designated in the act of Congress, which are given power to naturalize aliens, if it has "common-law jurisdiction." We have no courts in this country that derive their existence from the common law. Our State courts are all created by the organic law, or by legislative enactment. Their jurisdiction is not uniform. Some of our courts have only a statutory or special jurisdiction, limited as to subjects and amounts in controversy; others have original common-law jurisdiction, unrestricted as to class of cases and as to amounts in controversy. But our State courts, having what is called common-law jurisdiction, have not that jurisdiction to the same extent. By no means. We have courts with common-law jurisdiction in civil cases only, and others exclusively in criminal causes. It was so with the English courts, that had their origin in, and existed under, the common law, and derived their jurisdiction from that source. Some of them had jurisdiction only in certain classes of actions, and others in different and distinct actions.

Our statutory courts, although they may not have jurisdiction in all cases at law, both criminal and civil, are none the less, for that reason, courts with common-law jurisdiction. Their character, in this regard, is not determined altogether by the extent of their jurisdiction as to subjects over which they may adjudicate. We apprehend the State courts mentioned in the act of Congress as having common-law jurisdiction, are such as exercise their powers according to the course of the common law. It was not meant they should have all common-law jurisdiction over every class of subjects, including all civil and criminal matters. If this were so, it is apprehended but few courts could be found in any of the States that would possess the requisite "common-law jurisdiction." As a matter of fact, some subjects are excluded from the original jurisdictions of Circuit Courts in this State and in the State of Missouri; and perhaps no court in either State could be found with such extended and unlimited jurisdiction as to include within that jurisdiction all subjects determinable in the various courts, either under the

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statute or under the common law. It may be accurately said, a court having jurisdiction only in civil cases is, nevertheless, a court of general jurisdiction, although limited to a certain class of cases. The same is true of courts with exclusive jurisdiction in criminal causes, with no civil jurisdiction. Such courts may and do exercise their respective powers according to the course of the common law, and their jurisdiction may, with as much propriety as with many of the common-law courts of England, be said to be general.

Reference to the act of the legislature in evidence, creating the Criminal Court of St. Louis county, shows the Circuit Court of St. Louis county was thereafter prohibited from exercising original jurisdiction in any criminal case, or appellate jurisdiction of any case tried or determined before a justice of the peace or other magistrate. By positive statute some matters are excluded from the jurisdiction of Circuit Courts in this State; but can it, with any propriety, be said these courts are not, for that reason, courts of general jurisdiction? The proposition, it seems to us, would be absurd. The Circuit Court and the Criminal Court of St. Louis county were created by positive law, and both courts may have had jurisdiction given by statute, but that does not militate against the proposition they have general, common-law jurisdiction over all matters submitted to them, and exercise not only statutory powers, but powers derived from the common law.

It was pertinently said, *In the matter of Martin Conner*, 39 Cal. 58; S. C., 2 Am. Rep. 427, "the act of Congress does not require that the court shall have all the common-law jurisdiction which pertains to all classes of actions. It is enough that it has common-law jurisdiction."

In *Morgan v. Dudley*, 18 B. Monr. 693, the court, in an elaborate opinion, said, "the act of Congress, in designating the State courts that have authority to admit aliens to become citizens of the United States, does not describe them as courts of general, common-law jurisdiction, but as courts having common-law jurisdiction, and consequently embracing all that have either limited, or general, common-law jurisdiction."

In *Ex parte Gladhill*, 8 Metc. 168, it was held, Chief Justice SHAW delivering the opinion of the court, that the Police Court of Lowell, being a court of record, having a seal and clerk, and being vested with all the civil and criminal jurisdiction of justices of the peace, was a court of common-law jurisdiction, within the meaning of the act of Congress, with power to admit aliens to become citizens of the United States.

In *The People v. Pease*, 30 Barb. 588, one question was, whether the county courts in New York had jurisdiction, under the act of Congress, in matters of naturalization. The court said: "The County Court has

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common-law jurisdiction in the revision of all judgments given in justices' courts. The Court of Appeals is a court of general, common-law jurisdiction, and yet it has no original jurisdiction. The County Court, as an appellate court, is in like manner a court 'having common-law jurisdiction.' " Allusion is made, in the opinion of the court, to a decision made by Mr. Justice McLEAN, of the Supreme Court of the United States, holding that the probate courts of the several counties in Ohio had jurisdiction in naturalization proceedings, which is said to have been published in the "Law Gazette," but we have not been able to find the case reported anywhere.

In *Ex parte Burkhardt*, 16 Tex. 470, it was declared, the county courts of that State, though of limited jurisdiction, yet had common-law jurisdiction, within the meaning of the act of Congress.

In *Mills v. McCabe*, 44 Ill. 194, it was held, the "Marine Court of the city of New York" was not a court of record, within the meaning of the act of Congress conferring jurisdiction upon State courts to admit aliens to citizenship. That court was created by statute, its jurisdiction defined, and, as we understand, was a court of record for some purposes, but not for all. The proceedings on trial were informal, the pleadings oral, and, in technical strictness, there was no judgment roll. *De La Figaniere v. Jackson*, 4 E. D. Smith, 477.

It was in view of the fact the courts of New York had thus characterized the "Marine Court," declaring its proceedings in part oral, that this court, in its opinion, said: "Having been decided by competent authority to be a court of record only to the extent that it was declared by statute, and not to possess other powers incident to such a court, we are not authorized to hold it a court of record," and it was then added, "a fair and reasonable construction of the act of Congress requires us to hold that only a court of record for general, and not special, purposes, was intended to be embraced."

The case of *Knox County v. Davis*, 63 Ill. 405, declares, the court intended to be embraced in the act of Congress was one that exercised a general, although it might be a common-law, jurisdiction, limited as to the sum or amount in controversy, and it may be where some kinds of actions are excluded. The conclusion was, the county courts in this State, as organized under the Constitution of 1848, did not have jurisdiction to admit aliens to citizenship, and the reason assigned is, that court had no general, common-law jurisdiction in any matters. It is conceded those courts exercised a general and unlimited jurisdiction in the settlement of estates, and in all matters pertaining thereto, but that jurisdiction, it is said was strictly statutory. The common-law jurisdiction,

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in actions of debt and assumpsit, was limited to certain persons in their official capacity, and limited also as to the sum or amount in controversy, and hence the conclusion was reached it had no common-law jurisdiction within the meaning of the act of Congress.

But we are satisfied, on more mature reflection and a fuller examination of the reported cases, that this case, in so far as it held the county courts of this State, as organized under the Constitution of 1848, had no jurisdiction to grant naturalization, is in conflict with those authorities, and that it should be overruled, and so modified as to conform to the construction generally given to the act of Congress upon the subject of naturalization, which, under the Constitution, should be uniform. The construction of the act should be, as far as practicable, uniform by the decisions in the several States, that naturalization of aliens, valid by the decisions of the courts of one State, may not be declared invalid by the courts of another State.

It seems clear, upon authority, as well as upon construction of the Federal statute, the courts designated in the act of Congress which have jurisdiction conferred upon them to hear and determine applications for naturalization, need not possess general common-law jurisdiction over all classes of actions, but must be courts of record for all purposes, possessing powers incident to such courts, with common-law jurisdiction over all subjects upon which they have authority to adjudicate, and must exercise these powers according to the course of the common law.

Our conclusion is, the Criminal Court of the county of St. Louis is such a court, and it being shown to have "common-law jurisdiction," within the meaning of the act of Congress in relation to naturalization, it was, therefore, competent to admit defendant to all rights of citizenship.

The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

Mr. Justice BREESE: I do not concur in this opinion.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY V. LACKEY.

(78 Ill. 55.)

Constitutional law—making railroad companies liable for expense of coroner's inquest.

A statute made railroad companies liable "for all expenses of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision or other accident occurring to such cars, or otherwise." *Held*, unconstitutional so far as it attempts to make railroad companies liable in cases where they have violated no law or been guilty of no negligence.

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ACTION for money. The opinion states the case.

H. P. Buxton, for appellant.

BREESE, J. This is an appeal from the judgment of the Marion Circuit Court, rendered at the October term, 1870, upon the following agreed state of facts:

"It was agreed in this case that, during the year 1869, three persons were run over and killed by trains on the railroad of appellant, in Marion county, and the appellee, being coroner of said county at the time, held an inquest in each case, the expenses of which, together with the costs of burial, amount, in the aggregate, to \$91.15; that if appellant was, in law, liable to appellee, upon the facts stated, for the above amount, then judgment should be rendered in favor of appellee therefor, and if not so liable, then judgment should be for appellant, with the right to either party to appeal."

In 1855, the General Assembly of this State passed an act entitled "An act to provide for the burial of the dead occurring on railroads, and in or by vehicles carrying passengers," in the second section of which act it is provided that "every railroad company running cars within this State shall be liable for all the expense of the coroner at his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision, or other accident occurring to such cars, or otherwise; and any coroner, city, town or person who shall take charge of and decently inter any such body or corpse, or cause an inquest to be held over such corpse, shall have cause of action against such company, before any court having competent jurisdiction." Sess. Laws 1855, p. 170; Scates' Comp. 423.

It is insisted by appellant, that this statute is not within the constitutional competency of the General Assembly to enact, as it places the burden of these expenses upon the railroad companies, which, in other cases of like nature, is placed upon the estate of the deceased, or upon the county in which the accident may occur. This is the general law. R. S. 1845, ch. 99, title, "Sheriffs and Coroners," § 23; R. S. 1874, § 21, title, "Coroners."

It may, very pertinently, be asked, why this distinction? On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which, in other cases, are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred?

An examination of the section will show that no default, or negligence

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of any kind, need be established against the railroad company, but they are mulcted in heavy charges if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful, and of great public benefit. It is not claimed that the liability attaches for a violation of any law, the omission of any duty or the want of proper care and skill in running their trains. The penalty is not aimed at any thing of this kind. We say penalty, for it is in the nature of a penalty, and there is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected. Neither is pretended in this case, nor are they in the contemplation of the statute. A passenger on the train dies from sickness. He is a man of wealth. Why should his burial expenses be charged to the railroad company? There is neither reason nor justice in it; and if he be poor, having not the means for a decent burial, the general law makes ample provision for such cases. As argued by the counsel for appellant, the law attempts to place what is properly a public burden upon these corporations, which should be borne by all alike, and discharged out of public funds raised by equal and uniform taxation.

This may be considered in the light of a special tax, for which there is no sanction in the Constitution. We have not been furnished with any brief, points or argument for the appellee. The views presented by appellant satisfy us the law in question cannot be sustained as a constitutional enactment.

In 1874, the General Assembly repealed this statute, by ch. 131, title "Statutes," R. S. 1022, but, at the same session, re-enacted it substantially, giving the power to sue, not to the coroner, as here, but to the county. *Ib.*, title "Coroners," 283, § 22.

For the reasons given, the judgment is reversed.

Judgment reversed.

PLUMMER, appellant, v. RIGDON.

(78 Ill. 222.)

Damages — for failure to convey land.

In an action by a purchaser of land for breach of the contract to convey, *held*, that the measure of damages was the value of the land at the time when the conveyance ought to have been made.*

* See *Kirkpatrick v. Downing*, 17 Am. Rep. 678, and note.

ACTION of assumpsit. The opinion states the case.

Brandt & Hoffman, for appellant.

Baker & Osgood, for appellee.

CRAIG, J. This was an action of assumpsit, brought by Charles W. Rigdon, to recover damages from George W. Plummer, for the breach of a written contract executed by the parties for the exchange of certain real estate in Chicago.

A trial of the cause before a jury resulted in a verdict in favor of Rigdon, for \$3,000. The court denied a motion for a new trial, and rendered judgment upon the verdict, to reverse which, this appeal was brought.

It is first urged that, even if the measure of damages had been the difference in value between the lands agreed to be exchanged, the verdict is against the evidence.

In regard to the real value of the lands agreed to be exchanged at the time conveyances were to be made, the evidence was conflicting, and while the evidence might seem to preponderate in favor of appellant, yet, under the uniform decisions of this court, unless it is apparent the jury have been actuated by passion or prejudice, and rendered a verdict manifestly wrong, we cannot interfere.

The difference between the actual value of the lands agreed to be exchanged, which formed the basis for the verdict, was purely a question of fact for the jury, and, as is usual in proving the value of property, there was a clear conflict in the proof, which it was the duty of the jury to reconcile. This they seem to have honestly done, and it is by no means certain, if the same facts were submitted to another jury, under the same instructions, the result would be otherwise. Under such circumstances, if the law applicable to the facts has been properly given, the verdict must be regarded as final.

The next question properly arising upon the record involves a consideration of the instructions in regard to the measure of damages.

The court, at the instance of appellee, instructed the jury, in substance, that the measure of damages was the difference between the value of the lands agreed to be exchanged, and refused the instructions of appellant, which, in substance, confined the recovery to actual expenses and damages suffered, excluding any difference in the value of the property agreed to be exchanged.

It is clear, from the evidence, that appellant's failure to convey the property embraced in the contract did not arise from any impure motive

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or fraudulent purpose. The difficulty was, that he only had title to an undivided half of the property agreed to be conveyed, while the other undivided half was in one McClintock, who refused to join in the conveyance, and carry out the written contract of sale which appellant had entered into.

Appellant, no doubt, at the time he made the contract, thought and honestly believed that McClintock, who was, at the time, his father-in-law, would join with him in the conveyance of the property. This, however, McClintock refused to do. This left appellant powerless to perform the contract.

The question, then, presented, is this: Where a vendor contracts to sell real estate for a stipulated price, at a certain time, and upon the arrival of the appointed time is unable to convey, in an action brought by the vendee to recover for a breach of the contract, what is the true measure of damages?

This point arose at an early day in this State, and, independent of what view we might now be inclined to take, were it a new question, it must be regarded as settled by the former decisions of this court.

In *Buckmaster v. Grundy*, 1 Scam. 310, which was an action of covenant, brought by the vendee against the vendor, to recover damages for a failure of the vendor to convey lands as required by a contract under seal, the court said: "It is also urged that the exact sum actually paid must not only be averred but proved, and that the sum so paid, and interest, constitute the measure of damages to be assessed by the jury. Though this may be the rule in an action upon a warranty, to recover back the consideration, in case of eviction, it is not the rule in an action of covenant for a breach in failing to convey according to the terms of the contract. In such case, the value of the land at the time it is to be conveyed (as established by evidence) is the true measure of damages."

The same question again arose in *McKee v. Brandon*, 2 Scam. 339, and the court, in deciding the point, said: "The rule was correctly laid down, that the measure of damages for the non-conveyance of the land was the value of the land at the time it was to be conveyed."

In *Gale v. Dean*, 20 Ill. 320, which was an action brought by Dean against Gale, to recover for a breach of a contract which provided that Gale should procure a conveyance of a tract of land from a third party, it was said: "The measure of damages in this case was not the value of the land when the contract was made, but its value at the time of the breach of that contract."

Under these authorities, it may be regarded as the settled law in this State, that, in an action by a vendee to recover damages for a failure to

convey, the value of the land, at the time the conveyance is to be made, is the true measure of damages.

It is true, a different rule prevails in England, and it was held, in the leading case of *Flureau v. Thornhill*, 2 W. Blackstone, 1078, that, upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, the purchaser was not entitled to damages for the fancied goodness of the bargain which he supposed he had lost.

But even in that country the decisions of the courts do not seem to be harmonious upon the question, and, notwithstanding the clear enunciation of the rule in *Flureau v. Thornhill*, *supra*, in a later case, of *Hopkins v. Grazehook*, 6 Barn. & Cress. 31, it was said: "Upon the present occasion, I will only say that, if it is advanced as a general proposition, where a vendor cannot make a good title, the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it." The defendant was accordingly held responsible for the damages sustained by a breach of the contract.

In *Robinson v. Harman*, 1 Exch. 850, the same rule was applied. See, also, *Pounsett v. Fuller*, 17 C. B. 660. These decisions last cited proceed upon the ground that, where a vendor sells that which he knew he did not, at the time, own, and was not certain of acquiring, he should, in such cases, be held liable for all damages sustained by the purchaser by the loss of the bargain, but upon what principle these cases can be distinguished from *Flureau v. Thornhill*, *supra*, in an action at law upon a contract, it is not quite apparent.

Under the doctrine announced, however, in *Hopkins v. Grazehook*, *supra*, appellee was entitled to recover damages for the loss of his bargain, which damages should be measured by the value of the lands to be conveyed to him by the contract of purchase, for the reason that appellant sold land which, at the time he made the contract, he knew he did not own.

Appellant insists that the rule which governs in an action to recover damages for the breach of a covenant of seizin, where the recovery is confined to the purchase-money and interest, should control in an action for a breach of an executory contract to convey lands.

This is the rule adopted in several of the States. The rule, however, is different in this State, and we are satisfied the doctrine announced by our court is sustained by the weight of authority. *Hill v. Hobert*, 16 Me. 164; *Hopkins v. Lee*, 6 Wheat. 109; *Drake v. Baker*, 34 N. J. 858; *Lawrence v. Chase*, 54 Me. 196; *Boardman v. Keeler*, 21 Vt. 84; *Kirkpatrick v. Downing*, 58 Mo. 32; S. C., 17 Am. Rep. 678; *Barbour v. Nichols*, 3 R. I. 187; *Wells v. Abernethy*, 5 Conn. 222.

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Neither is it clear why the rule that controls in an action to recover for a breach of the covenant of seizin should be applied where an action is brought to recover for the breach of an executory contract.

In the former case, we presume the recovery is restricted to the amount paid for the land at the time the conveyance is made, because the covenant of seizin is broken, if the grantor had no title, at the time the deed was delivered. The right of action had then accrued. The fact that eviction subsequently followed for the want of title at the time the conveyance was made, could not affect the question, but a contract containing a covenant to convey land at a future day is of a different nature.

The covenant requires the conveyance to be made at a future day, if the land rises or falls in value. It is the right of the purchaser to receive a conveyance of it in its increased or diminished condition, on the day agreed upon in the contract.

If, then, the vendor fails to execute a conveyance at the time required by the contract, we see no reason why the damages of the vendee should not be measured by that general rule that gives the vendee the value of the specific article purchased, on the day it is to be delivered. *Cannell v. McClean*, 6 H. & J. 297.

It is also urged that the court erred in refusing appellant's second instruction, which was as follows :

"2. If the jury believe, from the evidence, that the plaintiff falsely represented to the defendant that the house on West Washington cost over \$7,000, when the same cost only \$4,500, and that the defendant relied on such representations, and the plaintiff, by other false representations, as well as the foregoing, induced the defendant to enter into the contract sued on, and that the defendant would not have entered into said contract but for the said false representations of the plaintiff—then the jury are instructed, as matter of law, that the plaintiff cannot recover in this case."

The record does not contain evidence upon which an instruction of this character can be predicated.

The contract executed by the parties required Rigdon to complete the house on Washington street according to certain plans and specifications. Appellant, when purchasing the property and making the contract, had no right to rely upon the statements of appellee as to the value or cost of the property. If he did so, it was at his own peril. By a reference to the plans and specifications, the value and expense of the building could have been determined.

A mere misstatement by a vendor of property, as to its cost or value,

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in the absence of any fiduciary relation between the parties, would not authorize a rescission of the contract for that reason. *Banta v. Palmer*, 47 Ill. 99.

It is also urged that appellee's first and eighth instructions assume, as a matter of fact, that there was a difference in value between the lands agreed to be conveyed.

Upon a careful examination of the instructions, we fail to find that they are liable to the criticism made upon them. They are not drawn in such a manner as to prejudice appellant's case or mislead the jury.

The last point relied upon by appellant is, that the court improperly excluded the offered evidence that the auction sale made by appellee of a portion of the property appellee agreed to convey appellant, was a sham.

If appellant had offered to prove any admissions of appellee to the effect that the auction sale was not made in good faith, such would have been proper, but we are aware of no rule which would permit proof of a general notoriety with which appellee was in nowise connected.

As no substantial error is perceived in the record, the judgment will be affirmed.

Judgment affirmed.

MORLEY, appellant, v. TOWN OF METAMORA.

(78 Ill. 394.)

Surety — on official bond — liability for moneys received in former term.

A town officer, at the expiration of his term of office, made a report showing the amount of money in his hands belonging to the town, and the report was approved by the town. He was re-elected and gave a new bond with new sureties. Held, that the latter were liable on his failure to account at the end of his second term for the money so reported at the end of his first term.*

ACTION against the sureties upon an official bond. The opinion states the case.

Clark & Ellwood, for appellant.

Chitty & Page, for appellee.

* See *Vivian v. Otis*, 1 Am. Rep. 199; *Inhabitants of Rochester v. Randall*, 7 Id. 519 and note.

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SCOTT, C. J. This action is upon the official bond of a supervisor, to recover money which, it is alleged, he had in his hands at the expiration of his term of office, and failed to pay over to his successor, on proper demand being made. The condition underwritten the bond is in the usual form, and is in conformity with the provisions of the statute.

The principal in the bond was first elected supervisor in April, 1872, and was elected his own successor in April, 1873. The sureties on the bond given in the first year were not the same as on the one given the second year. It appears that, just before the expiration of the first term for which he was elected, he made a report to the proper officers of the town, that he then had in his hands an amount of money about equal to the present judgment. His report was approved. On his re-election he gave a new bond, and entered anew upon the discharge of the duties of his office. It is upon this bond the action was brought.

It further appears, that during the last year the supervisor accounted for an amount of money about equal to the amount by him received during that year. The defense is, the defalcation all occurred during the first year, and hence the sureties on the first bond are liable for it.

There is no contest that the amount recovered is due from the supervisor to the town, but the question is, upon whom is the liability for the default, whether upon the sureties on the first or the second bond.

It is not made to appear very clearly, that whatever default occurred took place in the first year the supervisor was in office; but, conceding that fact, we do not think it relieves the sureties on the bond upon which this action is brought, from liability. The supervisor was his own successor in office. He had made his annual report, in which he charged himself with having a certain amount of money in his hands. That report was approved, and we must presume it was true. When he was re-elected, it was in his hands as his own successor. These facts appeared upon the public records of the town. The new securities upon the official bond of supervisor must be held to have had notice of what appeared on the public records. In contemplation of law, the money mentioned in his report was in the hands of the supervisor, and the undertaking of the sureties on his bond was that he should account for it. It was as much his duty to account for whatever funds were in his hands at the end of the first year, as it was to account for whatever should be received during the second year. The law made the sureties responsible for any default in that regard. There could be no action maintained against the sureties on the first bond at the expiration of that year, for there was no one who could make a demand for the money the supervisor reported as having in his hands, so as to establish a default.

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This case in principle is not unlike *Pinkstaff v. The People*, 59 Ill. 148. In this case, as in that, the principal stood chargeable with certain funds, and the legal effect of the undertaking of the sureties is, that he should pay the same to his successor in office, on proper demand being made.

The judgment is warranted by the law and the evidence, and must be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

LUKE, appellant, v. STATE.

(49 Ala. 30.)

Arson — setting fire to jail in order to escape.

A person confined in a jail on a criminal charge, for the purpose of escape set fire to the jail. There was no intention to consume the building and the fire was controlled by the person setting it in order that it should not do so. Held, that such person was guilty of arson. (See note, p. 271.)

INDICTMENT for arson against Si Luke and others for setting fire to the county jail of Wilcox county. The persons indicted were convicted and sentenced each to confinement in the penitentiary for two years. Such other facts as are material appear in the opinion.

J. McCaskill, for appellant.

Ben. Gardner, Attorney-General, *contra*.

B. F. SAFFOLD, J. The appeal is from a conviction of arson, in setting fire to or burning the jail of Wilcox county. The appellant was confined in jail under a charge of assault with intent to murder, together with Nettles, who was under indictment for rape. The two attempted in concert to break prison, by burning a hole through the floor of their apartment. They had burned the floor about six inches deep, but not entirely through, when they were detected by the jailor and others, who extinguished the fire. While committing the burning, they controlled

the fire with water saved from their allowance. The questions involved in the charges given and refused are: Whether the burning for the purpose of escape, and without the intention of consuming the building, would constitute arson; and whether, both being prisoners, and each endeavoring to escape, they can be said to have assisted each other to escape, which is made a felony by R. C., § 3573.

The indictment was maintained under R. C., § 3698, which declares that "any person who willfully sets fire to, or burns, any church, meeting-house, court-house, town-house, college, academy, jail, or other building erected for public use," is guilty of arson in the second degree. The setting fire to, or burning, was sufficiently done. Any destruction of the material of the house, no matter how slight, is a burning within the prohibition. *Graham v. The State*, 40 Ala. 659. Was it done *willfully*? This term means less than maliciously, and more than intentionally or designedly. It means unlawfully, and to some extent wickedly. A setting fire to a house for any unlawful purpose cannot be innocent, though the purpose is not accomplished. If a person from the outside should set fire to a house, with the intention of burning a hole through which he might enter and steal, he would not be guilty of burglary, unless he succeeded in making the hole and entering. Unless he would be guilty of arson, this dangerous crime could scarcely ever be proved, because the perpetrator would truly have some other purpose to be accomplished by the burning.

Breaking jail, by the common law, is a felony, or a misdemeanor, according as the cause of the imprisonment belongs to the one grade or the other. 2 Bish. Crim. Law, § 1031. We have no statute declaring and punishing the offense of breaking jail by one charged with felony, but not convicted. As a misdemeanor, which it includes, it is punishable under R. C., § 3754, recognizing and providing the punishment of all misdemeanors at common law not enumerated in the Penal Code. Imprisonment for crime gives no immunity to the prisoner to commit crime. He remains subject to all of the restraints imposed on other persons. The least privilege of escape conceded to a prisoner would carry with it the right to use any means he could command. It is a misdemeanor if, without any obstruction, he merely walk away. 2 Bish. Crim. Law, § 1063. The causeless setting fire to a house, by a person of responsible mind, is arson, because the necessary intention is presumed from the act. The same act, done with the intention of committing a crime, whether felony or misdemeanor, must also be held to be arson, because the very recklessness of the deed supplies the willful intention.

2. The case is aggravated, so far as the intention is concerned, it is

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defendant and Nettles can be said to have assisted each other, for then they were in the commission of a felony. R. C., § 3573. Is it possible to separate the idea of assistance from the single design of each to effect his escape? If so, any combination of prisoners to effect their escape, no matter how formidable, or how destructive in its results, is no more criminal than the single effort of one who could, perhaps, have accomplished no mischief. In *The People v. Rose*, 12 Johns. 339, the defendant attempted to escape by breaking the prison, in consequence of which a fellow-prisoner, confined for felony, was enabled to escape. The court said the case was clearly within the mischief which the statute was made to prevent. The indictment was for aiding a prisoner confined for felony to escape.

The two authorities cited by the appellant, *State v. Mitchell*, 5 Ired. 350, and *People v. Cotteral*, 18 Johns. 115, assert the doctrine, that if a prisoner in a jail set fire to it with the design of merely breaking a hole through to effect his escape, and not of burning it down for that purpose, it is not arson. Bishop dissents from such a proposition, holding it not necessary that the intent should be to commit a felony. 2 Bish. Crim. Law, § 41.

All of the authorities agree, that where the firing is done with the intention of committing any felony, it is arson. Our Penal Code very properly omits to graduate the offense of breaking jail by the character of the offense for which the accused is imprisoned, because the mischief is the same no matter by whom committed. The guilt or innocence of this defendant is not dependent upon whether he was in the commission of a different felony or not. He intentionally and designedly set fire to the jail, in order to accomplish an unlawful purpose, and consequently the burning was willfully done. It would not be safe to graduate his offense by the extent of the burning he intended to do, because, as far as intention constitutes the crime, the criminality is the same whether the house is burned slightly or consumed. The lives and property of other persons cannot be made dependent upon his supposition of how much burning he can do without consuming the house.

Judgment affirmed.

NOTE.—In *People v. Cotteral*, 18 Johns. 115, it was held that setting fire to a jail by a prisoner, merely for the purpose of effecting his escape, was not arson, and that it was not "willful burning of an inhabited dwelling-house" within the meaning of the statute, although a jail was deemed an inhabited dwelling-house within the act. To the same effect are *State v. Mitchell*, 5 Ired. 350; *Delaney v. State*, 41 Tex. 601. See *Jenkins v. State*, 53 Ga. 33; 2 Bish. Crim. Law (6th ed.), § 15.—REP.

GLOVER, appellant, v. ROBBINS.

(49 Ala. 219.)

Negotiable instrument — material alteration. Note payable “in specie.”

A promissory note made by M. and G., the latter signing as surety, was after execution, by the consent of M. and the holder, but without the knowledge of G., altered by adding the words “with interest.” Held a material alteration entirely discharging G.

The note was made in 1864, and was by its terms payable “in specie.” Held, that judgment could be recovered only for the amount of the note in United States currency.

ACTION upon a promissory note. The facts sufficiently appear in the opinion. The judgment below was for plaintiff, and defendant appealed.

Lyon & Jones, for appellant.

Brooks & Modawell, contra.

PETERS, J. This is an action on a promissory note, by the payee against the maker. The note offered in evidence to the jury is in the following words, that is to say :

“Five years after date, or sooner, should a treaty of peace be ratified between the Confederate States and the United States, we, or either of us, promise to pay, *in specie*, to Josiah Robbins, or order, six thousand five hundred dollars, with interest at four per cent.

“(Signed)

M. W. CREAH.

“October 10, 1864.

E. A. GLOVER.

“Witness,

P. D. FORNESS.”

The complaint consists of several counts, but the defense involves but a single point; that is, such an alteration of the note, after it was executed by Glover, as made it void as to him. To raise this question, Glover pleaded *non est factum* in answer to the counts upon the note in its present form. Only Glover is sued in this action; and the proofs showed that, at the time Glover signed the note, the words “with interest at four per cent” were not a part of it. He signed the note as the surety of Creah. It seems that, after the note was signed by Creah and Glover, in its original shape, it was left with Creah to deliver to Robbins, the payee, in that shape; but Robbins was unwilling to receive

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it in that state, and urged that there was a misunderstanding between Creah and himself about the interest that the note should bear. It was then agreed between Creah and Robbins, without any consent or knowledge of Glover, that Forness "might settle the disputed matter of interest; and Forness thereupon told Robbins that he had decided that the rate of interest upon the note should be four per cent, and walked into a house near by, with the note in his hand, and inserted in the face of the note the words, '*with interest at the rate of four per cent.*' and signed his name to the note as a witness." Glover never authorized this alteration to be made, and never assented to it, and knew nothing of it until he was sued.

Very clearly, this was a material alteration of the contract as made and assented to by Glover. He never stipulated to pay interest. The note then offered in evidence was not his contract, and the proof sustains his pleas. The court below ought so to have charged the jury, upon the counts on the note in the form it was offered in evidence. Does this alteration vitiate the note, as a binding contract with Glover, on the other counts of the complaint, in which it is described as a note, without the words "with interest at four per cent?" I think it does. In a recent case in the Supreme Court of Pennsylvania, a case quite parallel with this, that court declared that such an alteration rendered the note void. The action there, as in this case, was to charge the sureties on a promissory note which had been altered after they had signed it, without their authority or consent, by the maker, who was principal, and the payee, by adding the words, "Interest to be paid semi-annually." The court decide that this alteration discharged the sureties from liability on the note. The language of the court is this: "It seems to be settled, that a voluntary alteration of a bond, note, or other instrument under seal, in a material part, to the prejudice of the obligor or maker, avoids it, unless done with the assent of the parties to be affected by it. 1 Greenl. Ev., § 565; *Marshall v. Gougler*, 10 S. & R. 164; *Barrington et al. v. Bank of Washington*, 14 id. 422, 423; *Foust v. Renno*, 8 Barr, 378; *Henning v. Werkheiser*, id. 518; *Smith v. Weld*, 2 id. 54;" *Neff et al. v. Horner*, 63 Penn. 327; S. C., 3 Am. Rep. 555, 556; *Wood v. Steele*, 6 Wall. 80. The principle thus settled is in accordance with our own decisions, from a very early day up to the late rebellion. *Brown v. Jones*, 3 Port. 420; S. C., 4 Smith's Cond. 131; *White v. Hass*, 32 Ala. 430. See, also, *Miller v. Stewart*, 9 Wheat. 680; 4 Wash. C. C. R. 26; *Crockett v. Thomason*, 5 Sneed. 342; *Eliason v. Henshaw*, 4 Wheat. 225, and numerous cases cited in appellant's brief. The motive with which the alteration is made does not change its effect. The

alteration, without the authority or acquiescence of the surety, overturns the contract as to him; and the party so making the alteration can not fall back upon the original contract, because that is destroyed by the alteration. *Woodworth v. Bank of America*, 19 Johns. 391; *Fay v. Smith*, 1 Allen (Penn.), 477; also 1 Smith's Leading Cas. 1167, and note; and 52 Ala. 432, *supra*. The charges of the court below were in conflict with these principles, and they cannot be supported. The theory upon which the cases above cited proceeds is, not that the alteration is a fraud, but that it opens the door to fraud, and it is unsafe to relax it. 1 Greenl. Ev., § 565, and cases there cited.

2. The judgment of the court below is also unsupported by authority of law. It is in these words: "It is therefore considered and ordered by the court that the said plaintiff, Josiah Robbins, have and recover of the said defendant, Edwin A. Glover, the said sum of seven thousand five hundred and forty and $\frac{1}{10}$ dollars, in *gold or silver* coin, being the said plaintiff's damages as assessed by the jury aforesaid, or its equivalent in United States currency; for which execution may issue, to be levied and collected in gold or silver coin, or its *equivalent* in United States currency; and also that the said plaintiff have and recover of said defendant the costs of this suit, for which execution may issue, to be levied in United States currency." The note on which this suit is brought bears date on the 10th day of October, 1864, and it is made payable "in specie." There was no evidence offered to show what was meant by the word *specie*. But as there was no objection made to the verdict, which assessed the damages "in gold or silver coin," it is supposed that this interpretation was put upon this word by both the plaintiff and the defendant. Yet, as the debt was contracted long after the passage of the legal tender acts of Congress, regulating the payment of such contracts, the judgment should have been for so many dollars only, leaving it to be discharged in any legal tender currency or money of the United States. It is presumed that this is the result of the latest construction of the legal tender acts of Congress by the Supreme Court of the United States; and the decisions of that high tribunal, until modified or overruled, constitute the governing rule, and are a part of the paramount law of the land. *Legal Tender Cases* (*Knox v. Lee*, and *Parker v. Davis*), 12 Wall. 457; *Banks v. Supervisors*, 7 id. 26; 12 U. S. Stat. at Large, 345, 532, 709. See, also, *Hepburn v. Griswold*, 8 Wall. 605; *Kellogg v. Page*, 2 L. Reg. (N. S.) 1872, p. 618.

The judgment of the court below is reversed, and the cause is remanded.

Judgment reversed.

Donegan v. Wood.

DONEGAN, appellant, v. WOOD.

(49 Ala. 242.)

Protest — when made — Confederate notary — notary acting by deputy.

A bill of exchange, dated January 30, 1861, drawn in Alabama upon a drawee in New Orleans, and payable twelve months after date, was protested for non-payment at New Orleans, February 1, 1862. The notary protesting was such under the Confederate government. He made demand by deputy, and deposited notices, etc., in the Confederate post-office, and his certificate contained in place of a seal only an illegible mark made by some instrument. *Held*, that the law merchant is presumed to prevail in Louisiana, and that thereunder the presentment and protest were invalid and did not bind an indorser, because (1) they were not on the last day of grace; (2) the notary was not commissioned by a lawful government; (3) if he had authority to act he could not perform his duty by deputy; (4) the notices were not deposited in a lawful post-office; (5) the mark on the certificate was not a sufficient seal.

ACTION upon a bill of exchange brought by Donegan and Tabor as the surviving partners of the firm of Patton, Donegan & Company, against George W. Foster and William B. Wood: Foster becoming bankrupt the suit was discontinued as to him. The bill on which the action was founded was dated at Florence, Ala., January 30, 1861, and was drawn by one J. N. Bean on Scruggs, Donegan & Co., New Orleans, La. It was payable twelve months after date to the order of said Foster and Wood, by whom it was indorsed. Among the defenses set up were that the bill was not presented and protested in such a manner as to hold defendants. The circumstances constituting such defense were these. On the 1st day of February, 1862, the State of Louisiana was in rebellion against the government of the United States, having previously passed an ordinance of secession, and the government of said State, with all the offices and records, were seized by the insurrectionary government, and all officers holding commissions were holding them under the authority of that government. On that day one Hicks, who held a commission as notary public under the insurrectionary government, pretended to protest the bill for non-payment. The certificate of protest had for its caption "Confederate States of America, State of Louisiana," and stated that the said notary on the 1st day of February, 1862, made demand of payment of the bill "by his deputy, P. Bienvenue," it purported to be under the seal of the notary. There was no seal, but in the usual place of a seal there was the mark of some instrument, but it was not legible. The certificate that the notice of protest was given by depositing letters containing the same, and prop-

erly addressed to the said indorsers in the post-office in New Orleans, with the postage thereon prepaid. There was at that time no United States post-office in New Orleans, but only the Confederate post-office. The verdict below was for the defendant and plaintiff appealed.

Watts & Troy, for appellants.

T. A. Jones, R. O. Pickett, and George S. Houston, for respondent.

PETERS, J. [After stating the facts.] The most important question in this cause is that which arises on the rejection of the certificate of protest by the court below. This will be first considered. If there was no evidence of protest and notice to the defendant on the trial in the Circuit Court, there will be no necessity of going beyond this; because, whatever errors may have been committed, the verdict of the jury was correct, and the judgment of the court must follow it.

This bill of exchange, having been drawn in this State, on parties in the State of Louisiana, to be paid there, is a foreign bill of exchange. Rev. Code, § 1857. As such, it is governed by "the commercial law" applicable to such contracts. This commercial law is known to the court as a part of the common law. It is referred to by our statutes as a thing ascertained and defined. Rev. Code. §§ 1089, 1833, 1834. And this bill, being made payable in Louisiana, must be governed by the law of that State, as to the manner of making the demand and protest, whatever that may be. For the law merchant, which is a part of the common law, cannot override the local laws and commercial usages of any State which sees fit to alter it. 2 Parsons on Notes and Bills, 320, and cases there cited, and Edw. on Bills, 46. And if there is no proof to the contrary the courts of this State will treat the law merchant of Louisiana the same as our own. *Leavenworth v. Brockway*, 2 Hill (N. Y.), 201. Such law of the foreign State, if different from our own, must be proved as any other fact, according to the modes allowed by law. *Mostyn v. Fabrigas*, Cowp. 174; also, *Thrasher v. Everhart*, 3 G. & J. 234, 242; Story's Conf. L., § 638. The court cannot notice the local law judicially without such proof. *Drake & Wife v. Glover*, 30 Ala. 382.

2. In this case there was no evidence offered that the law of Louisiana governing the protest of bills of exchange was different from that of this State, or "the commercial law" referred to in the Revised Code, above cited. Then, let us apply this law as it governs such contracts in this State. Our law, which makes the certificate of demand, notice, and protest evidence, is in these words: "The certificate of a notary public, under his *hand and seal of office*, or of any *authorized person*, under his

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hand and seal, of the presentment for acceptance, or demand of payment, or protest for non-acceptance, or non payment of any instrument governed by the commercial law, or of service of notice of such presentment, demand, or protest, and the mode of giving the same, and the reputed place of residence of the party to whom the same was given, and the post-office nearest thereto, is *evidence of the facts contained* in such certificate." Rev. Code, § 1089. Here, the alleged notarial certificate shows that the demand was not made by the notary himself, but "by his deputy, P. Bienvenue." The demand of payment of a foreign bill must be made by the notary public himself. Kyd on Bills, ch. 7, pp. 136, 137; 3 Kent, 9; *Onondaga County Bank v. Bates*, 3 Hill, 59; Chitty on Bills, 217, 493, 8th ed. This is a requirement of the commercial law, which it is to be presumed prevails in Louisiana, unless the usage there is shown to be different, which has not been done. The certificate in this case does not show what the notary has done himself, but what another person has done for him. This may be true, or it may not. It is mere hearsay. It is not the officer who certifies what he has done himself and what he can record as a fact, but only what some one else has done for him. No doubt, the laws of Louisiana can authorize the notaries in that State to perform the duties of their office by deputy; but this is not to be presumed until it is shown, which has not been done. Then, by the law as known to the court, the certificate was, for this reason, insufficient.

3. But was *Walter Hicks Peters*, the assumed notary in this case, an officer of any government known to this court? A notary public is the officer of some known government. Very great credit is given to his acts as such, because he is an officer of some known government, entitled to recognition in the commercial world. See *Musson v. Lake*, 4 How. 262, 275. His certificate shows that he did not claim to be an officer of the government of the State of Louisiana as one of the "United States of America," but only an officer of Louisiana as one of the "Confederate States of America," that is, an agent of the insurrectionary organization in that State which assumed this name during the late rebellion. This was a government which has not been recognized, or accredited, by any lawful authority. It was a mere usurpation, sustained, while it lasted, alone by military force. The officer of such a government cannot give himself credit in our courts by his seal; and without this, his certificate is not competent under the statute above quoted. It may be admitted that the ordinance of secession did not take the loyal State of Louisiana out of the Union, nor destroy it; but it did furnish occasion to overturn its legal government, and establish an illegal and unconstitutional government in its stead. This occurred in the latter part of January, 1861;

and this insurrectionary government was in existence in that State, making war upon the national authority, at the time this protest purports to have been made. The mere fact that it was the *regnant* authority in the State of Louisiana at that time does not give validity or legality to its acts or its officers. The mere temporary triumph of rebellion does not give legality to the organization under which it is conducted. It is well known that what was called "the Confederate governments" in the seceding States were as much instruments of the rebellion as the insurgent armies in the field. They were essential parts of the rebellion itself, and were organized to give it aid and comfort. "The Confederate Government of America," so called, was of a like character, and was equally *regnant*, during the period of its existence, with those in the rebellion.

In speaking of this "Confederate Government of America," Justice SWAYNE uses this language: "The rebellion was simply an armed resistance to the rightful authority of the sovereign. Such was its character in its rise, progress, and downfall. The acts of the Confederate Congress creating the tribunal in question (the Confederate Court at Huntsville) was void. *It was as if it were not.* The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted." *Hickman v. Jones*, 9 Wall. 197, 200, 201. Then a government, to give it validity in the American Union, must have something more than mere insurgent force and *regnant* power to rest upon. It must also have constitutional authority, or some recognition as a government by the rightful political power, before the courts can give force to its acts or its officers. This seems to be the foundation of the judgment in the case of *Texas v. White*, 7 Wall. 700. Applying these principles to the State of Louisiana, it is well known that the *legal* government in that State was overthrown, at least as early as the 26th day of January, 1861, and that a *new* insurrectionary government was erected in its stead. And as early as the 4th day of February in the same year, this *new government* in Louisiana joined in organizing the rebel government of the so-called "Confederate States of America." And it continued in force as the *regnant* power in the State of Louisiana, and in the city and parish of New Orleans, from its institution up to the capture of that city by the Federal forces on the 25th day of April, 1862. The officers of such a government are not entitled to recognition in our courts, without some act of the legal power tending to such recognition. No such legalization was shown or attempted in this case. Without this, the notarial certificate was insufficient. *Toda v. Neal's Administrator*, at the present term, and cases there cited.

But it is not necessary to rely on a notary for the protest of a note or bill of exchange. If there is no *legal* notary, then it is sufficient if the protest be made out and drawn up by a respectable inhabitant of the place at which the instrument is payable, in the presence of two witnesses. But such a protest should pursue the form required by the laws or usages of the place where it is made. Story on Bills of Exchange, § 276, note 2. The certificate of such a person might be verified as his act *under his hand and seal*, and this would be sufficient without any notarial seal. Rev. Code, § 1089. Hence, a notary is not necessary, though convenient, for the purposes of commerce.

4. But the commercial law not only requires that a foreign bill of exchange shall be duly protested by a *legal* notary, or other *authorized* person, but also that notice of this protest shall be sent, with proper diligence, to the party or parties intended to be held bound, who are entitled to notice, or who have not received notice. If this is not done, such parties are discharged. *Musson v. Lake*, 4 How. 262, and authorities there cited. When the parties intended to be held liable on the bill or note are distant from the place of protest, the notice should be sent with due diligence; that is, with all reasonable dispatch. And in case there is a regular mail by which it may be sent, our statute makes this method of sending it sufficient. Our Revised Code directs, that "in all cases, where notice of non-acceptance of a bill of exchange, or non-payment of a bill of exchange, promissory note, or other negotiable instrument is given by sending the same by mail, it is sufficient, if such notice is directed to the place where the person sought to be charged by such notice resided at the time of the drawing, making, or indorsing such bill, note, or negotiable instrument; or to the post-office nearest his residence at the time, unless at the time of affixing his signature to such bill, note, or instrument, he specifies thereon the post-office to which he requires the notice to be addressed." Rev. Code, § 1850. This statute cannot be presumed to refer to any other "mails" than such as were regularly established by law. As these mails are carried by persons duly qualified, and acting in performance of a duty imposed by law, the presumption is that these persons properly and regularly discharge this duty. By reason of this presumption, it is *prima facie* evidence that a notice sent in this way has reached the person to whom it is addressed. And this is sufficient diligence, whether the person intended receives the notice or not. *Knot v. Venable*, 42 Ala. 186. But this presumption ends when the mode of conveyance is irregular and illegal, and the mail may not be carried at all, and when it is known that the regular mail has been indefinitely suspended. See 1 Parsons on Notes and Bills, 480, 481, 482, 483, 484;

also Story on Bills, §§ 287, 288, 300 *et seq.* It is known to the court, as a part of the history of the nation, that the regular mails "guaranteed by law" were suspended between the city of New Orleans, in the State of Louisiana, and the town of Florence, in this State, long before the bill in this case fell due, and that they were not renewed until long after the 1st day of February, 1862, the time that the notarial certificate declares the notice in this case was "put into the post-office" at New Orleans. See *Tyson v. Oliver et al.*, 43 Ala. 455, 458. The government of the United States then had no postal agents, or post-offices, used by it for the transportation of the mails in the city of New Orleans, and no mail service proceeding from that city to Florence. If there was any other method of conveyance for such notices, to supply the place of the regular mails, this should have been shown by proof outside of the certificate itself. It is not ground of a *prima facie* presumption that the notice was forwarded, that it was "put into the post-office" at a point from which no regular mails were carried, as "guaranteed by law." The proof of notice was then insufficient. *Todd v. Neal's Administrator*, at the present term.

5. Another objection taken to the certificate of the supposed notary is, that it is not under a *notarial seal*. There seems to have been an attempt to impress some mark upon the paper, on which the certificate is written, in the place of the seal; but it is so illegible that I am not able to determine that it is a seal of any kind, or that it was intended for a seal. But as this particular objection was not made to the instrument below, I am not confident that it was not waived. If the objection had been made in the court below, the plaintiffs might have supplied its place with a second copy of the notarial paper, more perfectly executed. I therefore waive any expression of opinion on this point. The following authorities seem to indicate that a legible seal is a necessary part of a notary's certificate of protest and notice. Story on Bills, § 277; 1 Parsons on Notes and Bills, 634; *Kirksey v. Bates*, 7 Port. 529; *Townsley v. Sumrall*, 2 Peters, 170; Rev. Code, § 1084. *Sed vide* Rev. Code, §§ 1089, 1091.

6. Besides this, it is a settled principle of "the commercial law" that a foreign bill of exchange is entitled to certain days of grace, after the day on which it falls due, before its payment can be demanded and the bill be protested for non-payment. Edw. on Bills and Prom. Notes, 517, 518, and notes; *Ib.* 47. This postpones the payment of the bill until the third day from the day it falls due. *Smith's Com. Law*, 244, 245, 246, Holcombe & Gholson's ed. 1847; Story on Bills, §§ 329, 333, 335 *et seq.* In this case, the bill is dated on the 30th day of January, 1861, and is payable twelve months *after date*. This language excludes

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the day of the date, which would make the day of payment, exclusive of the days of grace, fall on the 31st day of January, 1862. Chitty on Bills, 370, 12th Am. ed. Add to this the usual days of grace allowed on such an instrument, and the bill should not have been protested until the 3d day of February, 1862, instead of the 1st day of February, 1862. If there is any local usage, or law, in Louisiana, which changes this rule of the law merchant, it should have been shown by proof. This was not done. Then, in this case, the alleged notarial certificate shows that the demand of payment, and protest for non-payment, were made too soon. Such a protest is insufficient to bind the indorser. 1 Parsons on Notes and Bills, 394 *et seq.*; *Bank of Washington v. Triplett*, 1 Peters, 25, 31, 32; *Brown v. Turner*, 11 Ala. 752; *Savings Bank of New Haven v. Bates*, 8 Conn. 505; *Dollfus v. Frosch*, 1 Denio, 367. The notarial paper above referred to was, in this view of it, wholly insufficient to fix the liability of the defendant Wood. It was therefore properly rejected by the court.

7. It now remains to dispose of the demurrer to the *second, third and fourth* pleas, or those pleaded by Wood alone. These pleas do not seem to have been drawn with any very great deliberation and care. The demurrer is a general demurrer to all three of the pleas. Our statute requires that "no demurrer in pleading can be allowed but to matter of substance, which the party demurring *specifies*; and no *objection* can be taken, or allowed, which is not *distinctly stated* in the demurrer." Rev. Code, § 2656. The demurrer is in these words: "Demurrer, and joinder in demurrer, in short, by consent, because the matters pleaded furnish no bar to the action. Such demurrer does not come within the requisitions of the statute. It merely declares that the pleas are insufficient in law. This is not enough. It should state specifically the ground of objection, why the pleas are insufficient, so that the court could see at once what amendment, if any, could be made. Such demurrers are not to be allowed, and it is the duty of the court to overrule them. *Robbins v. Mendenhall*, 35 Ala. 722; *Helvenstein v. Higgason*, id. 259; *Burns v. Mayor, etc., of Mobile*, 34 id. 485; *Cotten v. Ruledge*, 33 id. 110; *Harrison v. Nolin*, 41 id. 256; *State, use, etc. v. Gardner*, 45 id. 46.

8. But are the pleas bad? I think not; though the matters they contain go much beyond what is required in stating the facts. The plea is an answer to the complaint, or any *material* allegation or fact of the complaint, which, if untrue, would defeat the action. The traverse may deny all the facts alleged, or any particular material fact. 1 Chitty's Pl. 525; *Brandner & Brandner v. Demick*, 20 Johns. 404, 406, *opinion by* WOODWORTH, J. Two of the material allegations of the

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complaint are: (1) "the said bill, not being paid at maturity, *was duly protested*"; (2) of which the defendant *had due notice*." These facts are so denied in the pleas that a material issue can be taken thereon. This is enough. Rev. Code, § 2638. If the plaintiffs had wished, in the court below, to strike from the defendant's pleas other allegations of facts which were non-essential, they should have assailed them by *specific* objections. But, by sustaining these pleas, it is not intended to recommend them as precedents in the practice of the courts of the State. It is possible that they might have been more technically drawn up.

For the reasons above stated, the judgment of the court below is affirmed.

Judgment affirmed.

GONZALES, appellant, v. HUKIL.

(49 Ala. 260.)

Estoppel — grantor of land without title.

A husband and wife conveyed land, as the husband's land, in which neither had any interest. *Held*, that the wife was not estopped from setting up against the grantee a title to such land thereafter acquired by her.

BILL to foreclose a mortgage. One Robinson and wife executed to Gonzales a conveyance of land in which neither had any title or interest, Robinson taking back for the purchase-money a note and a mortgage, which is the one in question, on the same lands, executed by Gonzales. Thereafter one Porter, who held title to the land, conveyed the same to Robinson in trust for Robinson's wife, who paid the purchase-money therefor to Porter. The court below decreed the property to the wife free from any contract of sale with Gonzales.

Walker & Murphey, for appellant.

Morgan, Bragg & Thorington, for respondent.

B. F. SAFFOLD, J. The bill was filed by the appellee, to foreclose a mortgage of land given by the appellant, Gonzales, to secure the payment of a note made by him in favor of the appellee's husband, for the purchase-money on a sale and conveyance of the land to him by the husband and wife. It alleged that the note had been turned over to the complainant by her husband, in consideration of her having paid for the

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land with money obtained from her father after the sale to Gonzales. At the time of the said sale to Gonzales, neither the complainant nor her husband, Robinson, had any title to, or interest in, the land whatever. But afterward, the owner (Porter) sold and conveyed it to Robinson, in trust for his wife. The purchase-money was paid by her. In addition to the special relief sought, the prayer was "for such other or further and different relief as the nature and circumstances of her case may require." The chancellor decreed the property to the complainant, free from any contract of sale with Gonzales, and perpetually enjoined him from setting up any claim to it by virtue of the alleged sale from Robinson.

The joint conveyance of land by husband and wife, as his property, does not estop the wife from setting up a title subsequently acquired. She is not *sui juris*, except to relinquish her dower. Tyler on Inf. & Cov. 316; *Jackson v. Vanderheyden*, 17 Johns. 167; *Teal v. Woodworth*, 3 Paige's Ch. 470. As Robinson and his wife had no interest in the land at the time of the sale to Gonzales, of course the latter took none by his supposed purchase. His note was without consideration, and his mortgage incapable of foreclosure. The chancellor had either to dismiss the bill, leaving the parties at sea about their rights, or to declare them as the full history of the case indicated. This he was enabled to do, without surprise to the defendant, under the disjunctive prayer for general relief. *Graham v. Cook et al.*, June term, 1871. The decree is affirmed.

Decree affirmed.

STEIN, appellant, v. MAYOR, ETC., OF MOBILE.

(49 Ala. 362.)

Constitutional law — municipal license tax — impairing obligation of contract.

The city of Mobile made a contract with S. whereby it was agreed that S. should carry on the water-works of the city without "let, molestation or hindrance" from the city, and should have the exclusive privilege of supplying water in the city. Held, that a license tax on S. for doing business under such contract, imposed by a city ordinance passed in pursuance of its charter, was invalid, as impairing the obligation of a contract.

ACTION by Albert Stein against the Mayor, Aldermen, etc., of the city of Mobile, to recover taxes paid under protest. The taxes in question were collected from plaintiff under an ordinance of the defend-

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ants, which was admitted to have been passed in pursuance of the charter of said city, whereby it was ordained "that all persons trading, carrying on any business, pursuit, trade, or profession in the city, shall obtain a license for the same, in the manner hereinafter provided." The business which it was claimed plaintiff carried on was the carrying on of the city water-works under a contract between him and the city, the provisions of which are given in the opinion. Such other facts as are of importance appear in the opinion. The court below rendered judgment for defendants and plaintiff appealed.

R. & O. J. Semmes, for appellant.

No counsel are marked for respondents.

PETERS, C. J. There is no controversy about the facts in this cause. They were fixed by agreement of the parties in the court below. From the statement of these facts, as shown by the record, it appears that the city of Mobile, in a proper manner, entered into a contract with the appellant, Albert Stein, to furnish said city with water. Said contract was so entered into on the 26th day of December, 1840; and the rights arising under it were to continue for twenty years at least, and thereafter until said city redeemed certain water-works conveyed to Stein, which had been formerly used or erected by said city, for the purpose of securing a supply of water for its inhabitants. By this contract, the city of Mobile agreed with Stein, upon his performance and compliance on his part with the stipulations and agreements in said contract, that he "shall and may retain quiet possession of said water-works for said term of twenty years, without let, molestation, or hindrance" of said city; "and said Albert Stein, his executors, administrators, and assigns, shall, during the said term of twenty years, or any further time until said works are redeemed as above stipulated, have the *exclusive privilege* of supplying to the citizens and inhabitants of the city of Mobile, water from the water-works aforesaid, at the sum or price which shall at no time exceed the following rates." Under this contract, which is but partly set out above, said Stein went into possession of said water-works and supplied the inhabitants of said city of Mobile with water, as he was required to do by its stipulations, up to the date of the mayor's license. There is no pretense that he has failed to perform and comply with said stipulations; or that said contract has yet expired; or that any of the duties under it have ceased to be required of him. In this contract, the city of Mobile, in its corporate and personal capacity, is the contracting party on one side, and Stein on the other. The business

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to be performed or carried on is within the limits of the city. The authority of the city does not extend beyond these limits. It is a grant to Stein, by the city, for this purpose; that is, a grant to him to carry on the business of his water-works in the city, under his contract. "A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant." MARSHALL, C. J., in *Fletcher v. Peck*, 6 Cr. 87, 137. The city of Mobile, by its ordinance or by-law, proposes to restrict the privilege thus granted, to do business in its limits under the contract above referred to, unless Stein shall purchase a license, by a fine or tax, which is arbitrarily imposed by the city government. Can this be done? This is the sole question in this case.

Evidently, the power of the city as a corporation, over its contracts, is no more than that of the citizen in a like case. A corporation cannot revoke a grant once made, and it cannot obstruct the full enjoyment of the privileges secured by it. The power to supply the inhabitants of the city with water necessarily implies the right to carry on this business in the city. If this right could be interfered with at all, as there is no limit to the interference, it may be defeated altogether. The contract shows that this was not the purpose of the parties. The city government is a creature of the State legislature. Its powers, then, are restrained by all the constitutional limits of the General Assembly of the State. It cannot pass by-laws or ordinances which impair the obligation of contracts. Ang. & Ames on Corp., §§ 18, 332, 333, 334, 335; Cooley's Const. Lim. 192, 193, 198. It cannot, then, revoke its grant. This would be to impair its contract. 6 Cranch, 137, *supra*. The ordinance which assails the privilege already granted impairs the contract on which it depends, and is void; and the tax levied under its authority, by way of license, cannot be supported.

The ordinance complained of is not merely a police regulation. The police power of the city refers rather to the regulation of its morals than its property. Blackstone's definition of this power is: "The due regulation and domestic order of the kingdom, whereby the inhabitants of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." 4 Bl. Com. 162; also Cooley's Const. Lim. 572, *et seq.* and cases cited in the notes. This is no regulation of this sort. It is simply a tax in restraint of a privilege already granted by the city

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to the grantee, Stein. The privilege or right to carry on the business of the Mobile water-works in the city, having been once granted, cannot be reasserted. The ordinance which attempts this impairs the grant, and is void. See *Mayor, Aldermen, and Commonalty of the City of New York v. Second Avenue Railroad Co.*, 32 N. Y. 261; also Cooley, 201, n. 4.

The judgment of the court below is reversed, and the cause is remanded at appellee's costs.

Judgment reversed.

WARING, appellant, v. GRADY'S EXECUTOR.

(49 Ala. 465.)

Custom — partnership agreement affected by.

It is the custom for those navigating steamboats on the Alabama river to purchase salt at Mobile, to be carried up the river and sold. *Held*, that such custom, in the absence of a contrary stipulation, would affect a partnership agreement made for the purpose of running a steamboat on that river, and the firm would be liable for salt purchased by a partner at Mobile for transportation and sale on the boat.

ACTION by the firm of Waring & Son against P. A. Grady and John J. Moulton upon an account. It was alleged in the complaint that the defendants were copartners and joint owners in the steamboat "Black Diamond," and in the freight thereof, and that defendants were indebted to plaintiffs for two hundred sacks of salt delivered to defendants as freight of such boat. In support of these allegations, which were denied, the plaintiffs at trial gave evidence, which was uncontradicted, to show that defendants were joint owners of the boat mentioned; that it was run by defendants from Mobile upon the Alabama and Tombigbee rivers for freight and passengers; that the profits and losses arising in such employment were divided between defendants; that it was, and had been for many years, the common practice in that trade, when the ordinary freight was scarce, and therefore deemed advantageous to increase the freights of the boat, to purchase salt at Mobile, to be carried up the river and sold, or exchanged for wood or expenses; and that this usage of the trade was deemed good economy, and was recognized and known to all the steamboat-men, merchants, and others, and to owners engaged in said trade, and was considered within the scope of said business; and that this was also often done, when no regular freight was offering, to raise money to pay the expenses of the up trip, to be repaid out of the profits of the down trip; and that it was, and is now, the

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every-day practice for owners and masters in charge of steamboats to make such purchase on account of the boat and owners, for the benefit of the vessel, and to increase or make up profits. The plaintiffs delivered salt at the request of Moulton, for such use on the boat named, which they charged to the boat and its owners. The defense set up by Grady, and established by evidence, was, that he had no knowledge of the purchase of the salt, and did not assent to it, and that the salt was sold for said Moulton's benefit.

The court charged, that unless Grady was aware of the purchase, or authorized or assented to it, he would not be liable for the salt, and refused to charge that the custom proved affected the partnership contract. The plaintiffs appealed.

Boyles & Overall and Geo. N. Stewart, for appellants..

D. C. Anderson, for respondent.

PETERS, C. J. A partnership is created by agreement of the parties who constitute it, and it may be entered into with reference to a custom or usage of the place where its business is to be transacted. If this custom is a legal one, and such as the law will enforce, it may modify the legal effect of the partnership agreement; and such a custom may be shown, in connection with the contract, to establish the intention of the parties in entering into it, for such a custom becomes a part of the contract itself, and explains its stipulations. *Sampson & Lindsay v. Gazum*, 6 Port. 123; *Mills v. United States Bank*, 11 Wheat. 431; *Cutler v. Powell*, 6 Term, 320. This doctrine, applied to this case, very clearly shows that the charge asked by the plaintiffs below ought to have been given to the jury. This charge was not abstract, but was fully supported by the evidence, which was wholly uncontradicted. It was asked in writing, and it contains a fair statement of a legal proposition, applicable to the issues submitted to the jury. The court erred in refusing to give it.

The charge given by the court was also incorrect, and was calculated to mislead the jury. It had the effect to withdraw from their consideration all that part of the evidence which tended to establish the custom or usage, which modified the legal effect of the partnership agreement, in reference to the purchase of the salt. Such a charge cannot be sustained. 29 Ala. 188; 24 id. 651; 23 id. 17; 22 id. 501, 796. If the obligations of the partnership were modified by the usage attempted to be proven, of which the jury must judge, then the contract of partnership permitted the salt to be purchased. What this contract permitted was

within the scope of the business in which the firm was engaged ; and, within this scope or limit, the act of one partner is the act of all, and binds all. 3 Kent, 40, 41 ; 1 Parsons on Contracts, 174-5, and cases there cited. If a partner wishes to protect himself against such a usage, the partnership agreement should be so framed as to do this, or he should give notice of dissent. 27 Ala. 245.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

Judgment reversed.

BIBB, appellant, v. HITCHCOCK.

(49 Ala. 468.)

Negotiable instrument — note given for embezzled funds.

A clerk in a post-office embezzled funds for which the postmaster was liable to the government. To secure himself the postmaster induced the clerk to give him a note with surety, he agreeing not to prosecute criminally for the embezzlement. Held, that the note was valid and the surety liable.*

SUIT in Chancery by Hitchcock against Bibb to set aside a judgment at law and permit a rehearing on the ground that a promissory note upon which the judgment was founded was void as against public policy. The facts were as follows: In 1868 one Raley was clerk in the post-office at Montgomery, Alabama, and Bibb was postmaster. Raley embezzled a considerable amount of the funds belonging to the postoffice. For these funds Bibb was responsible to the United States. The bill of complainant stated that after Bibb discovered said embezzlement he became "anxious to secure himself against loss, and agreed with said Raley that if said Raley would give him a promissory note for the amount embezzled, he would not institute criminal proceedings against Raley ; that in pursuance of said agreement, Raley promised to give a note with security. In execution of this agreement, Raley gave a promissory note to Bibb, signed by complainant Hitchcock and others for the amount embezzled. The judgment mentioned was upon this note. The bill claimed that the facts connected with the giving of the note constituted a good defense thereto. An injunction was granted upon the bill, and from a denial to dissolve it and dismiss the bill, Bibb appealed.

* See *Buck v. First Nat. Bank*, 15 Am. Rep. 189.

Bibb v. Hitchcock.

L. A. Shaver, for appellant.

Thomas G. Jones, for respondent.

PETERS, C. J. [After stating the facts and considering whether complainant had shown sufficient excuse for failing to defend in the suit at law.] But is the defense insisted on sufficient to bar a recovery at law? If Bibb was bound to make good the amount of Raley's embezzlement, as the bill alleges, then he stood in the attitude of security for Raley, and Raley would be bound to refund to him the amount he would be forced to pay for the embezzlement. The giving of the note to Bibb, by Raley, showed that he accepted the payment that Bibb made for him. This would establish the relation of debtor and creditor between them. *Ross v. Pearson*, 21 Ala. 473. The consideration of the note was, then, a debt which Raley owed to Bibb, for the amount of the embezzlement. This was a legal consideration, and Raley could not be permitted to repudiate the payment of the note. If the note bound Raley, as it certainly did, it also bound his surety to the same extent. *Evans v. Keeland*, 9 Ala. 42. The agreement to give the note with surety, for the amount of the embezzlement, is not the contract on which the suit in this case is founded. That agreement is such an one as the law might not have enforced; but the contract of the note, to which the agreement led, is quite a different thing. This latter contract is not affected with the vice of that agreement. It was proper and right in itself, and it is founded on a legal consideration, as is shown in the bill; that is, the obligation that Raley was under to Bibb, to make good the amount of the embezzlement that Bibb was liable to pay for him. 2 Kent, 468; *Howe v. Synge*, 15 East, 440. The general rule is, that any act of the plaintiff, from which the defendant derives a benefit, is a sufficient consideration to support a promise or contract. 1 Brick. Dig. 382, § 114, and cases there cited. Bibb's act in paying the amount of the embezzlement for Raley was a benefit to Raley. The consideration of Raley's note is this benefit, and not the agreement to refrain from the prosecution of said Raley for embezzlement, as is argued in appellee's brief. There is, then, no sufficient defense shown in the bill to the suit at law. The motion to dismiss for want of equity should have prevailed in the court below. In refusing this motion, the court erred.

The judgment and order of the court below is reversed, and this court, proceeding to render the decree that should have been rendered in the court below, doth order, adjudge, and decree that the injunction heretofore allowed and issued in this case be dissolved; that this bill be dismissed out of this court for want of equity, and that appellee, said Henry

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W. Hitchcock, pay the costs of this suit in this court, and in the court below.

Judgment reversed.

COUSINS v. STATE.

(50 Ala. 113.)

License — statutes requiring, constitutional.

A statute of Alabama provided that every person engaged in a profession should take out and pay a specific sum for a license, and the doing of professional business without a license was declared a misdemeanor and punishable as such. *Held*, that the statute applied to lawyers, and was constitutional.*

INDICTMENT against an attorney for violation of the revenue laws of the State in practicing and carrying on the business of his profession without taking out a license. By a statute entitled "An act to establish revenue laws for the State of Alabama," passed in 1868, it was provided that any person who "shall be engaged in or carry on any business or profession, or do any act, for the doing, prosecuting or carrying on of which a license is by law required to be taken out, without having paid for and taken out such license, shall be deemed guilty of a misdemeanor and shall be fined three times the amount of such license, and may be confined in the county jail not exceeding one year, at the discretion of the court." Among the professions for which a license was required to be taken out was that of the law. The defendant below demurred to the indictment upon this among other grounds: "That the law set forth in said indictment, so far as it applies to lawyers, is unconstitutional and void, and for these reasons the indictment does not charge any offense." The court below overruled the demurrer, and a jury trial was had, whereat the defendant was convicted and fined as provided by statute. The other facts appear in the opinion.

Thos. H. Watts, for defendant Cousins.

Ben. Gardner, Attorney-General, for State.

PETERS, C. J. [After considering the form of the indictment.] The third objection urged in the demurrer is also untenable. Since the decision of the case of the *Mayor, etc., of Mobile v. Yuille*, 3 Ala. 137, it has not been seriously doubted, in this State, that the General Assembly has power to raise revenue by license on the business and occupations of

* See *Ould v. Richmond*, 14 Am. Rep. 139.

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the people. In that case, Judge ORMOND declares: "The decisions of this court in the *Matter of Dorsey*, 7 Port. 295, has been referred to, as sustaining the position that the act is unconstitutional. But the ground upon which the law in that case was held to be void, was not that the legislature could not regulate the matter, and provide for the licensing attorneys at law, but because the act was partial, and did not operate alike on all the citizens of the State. Thus, Judge GOLDTHWAITE holds this language: 'As the Constitution is silent with respect to the pursuits of business or pleasure, the General Assembly has the power to prescribe any qualification, not inconsistent with the rule that equality of right must be preserved; in other words, that any citizen may lawfully do what is permitted to any other. It rests with the legislative power to prescribe the conditions on which any avocation or calling shall be pursued, so that the door is closed to none; and there seems to be no other limit to their discretion, than the one which arises from the first section of the bill of rights referred to.' " 8 Ala. 140.

In the case above cited, Yuille was a baker in the city of Mobile, and he violated an ordinance of the city government, controlling the weight of his bread sold to citizens of the city. He was sued under the ordinance, and fined twenty dollars; and he appealed from that judgment to this court. Here, the chief question discussed was, the power of the General Assembly to control and prescribe the conditions on which any avocation or calling shall be pursued; and it was settled, that this power is absolute, if the control exercised is imposed on all alike. This was in 1841. Since that time, this power has been constantly exercised. Under the present revenue laws, the occupations which are regulated by a license are between thirty and forty in number. Pamphlet Acts 1868, 330-33, §§ 112, 114, 115. If the power fails as to one occupation, it fails as to all. This has never been seriously contended since the decision in the case of Yuille, above quoted.

But it is contended, that the lawyer alone is exempted from this power of regulation by the General Assembly. This exemption he derives from the privilege to practice his profession at all, dependent upon his license as an attorney at law. In the technical sense of the word, the sense in which it is used in the statute, he is no lawyer without a lawyer's license to confer that privilege upon him. The license of an attorney at law creates his occupation simply. If he does not engage in its practice, he is not bound to pay the license demanded by the statute. If he does, then he must do so under the law which prescribes the conditions upon which the occupation may be engaged in, or carried on. There is nothing particularly sacred in the profession

or business of a lawyer, which puts him above the legislative power to place on his shoulders his just share of the necessary burdens of the State. If his share of this particular burden is unequal, and he complains of it for this reason, it will be removed; but, without this, he has no more right to avoid his duty, than the tobacco dealer, the peddler, or the citizen who publishes a newspaper, or bakes bread. The right to regulate the property and the avocations of its citizens by the State is sovereign, and it should neither be abrogated nor abandoned.

It is the sacred duty of the citizen to obey the laws of the State. A failure, or refusal to do this is "against the peace and dignity of the State." It is a defiance of the sovereign power. Such conduct has all the elements of crime, if wilfully adhered to; and this justifies the State in classing it with misdemeanors. There can be, I think, no doubt of the authority of the State so to treat it, and to enforce obedience by indictment and the infliction of penalties by way of punishment. That has been done in this case. When the grade of punishment is fixed by law, the courts can neither fall below it, nor transcend it. 47 Ala. 47.

The punishment in this case is a fine three times the value of the license required by law, and the court should inflict it. In this prosecution, the fine was sixty dollars, under the act of December 31, 1866, which fixes the price of the license at twenty dollars. But this clause of the act has been since repealed, and the price of a license is now ten dollars. Pamphlet Acts 1870-71, 7. This would make the fine thirty dollars, which was the amount of the fine imposed in the court below. This was correct. The judgment is, therefore, affirmed.

Judgment affirmed.

R. F. SATTFOLD, J., dissented.

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(50 Ala. 142.)

Criminal law — intoxication as excuse for crime.

No degree of intoxication will excuse a criminal act, but it is otherwise in respect to mental unsoundness produced by drunkenness and remaining after the intoxication has ceased.

INDICTMENT for murder. The facts appear in the opinion. The defendant was convicted in the court below.

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Houston & Pryor and L. P. Walker, for the prisoner.

Ben. Gardner, Attorney-General, for the State.

PETERS, C. J. The offense charged in this prosecution is thus stated in the indictment: "That before the finding of this indictment, Henry Beasley, unlawfully, and with malice aforethought, killed Joseph Todd by shooting him with a pistol; against the peace and dignity of the State of Alabama." To this, the accused pleaded "not guilty," and went to trial on this plea by a jury. The verdict of the jury was against him, and he was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for eleven years. From this judgment of conviction the accused appeals to this court. The only errors complained of are those alleged to be founded on the charges of the court below, which were excepted to, and made a part of the record by bill of exceptions.

The defense set up on the trial was insanity, from the effects of a gunshot wound in the head, and habitual drunkenness. Murder in the second degree is thus defined in the Code; "Every other homicide" (murder in the first degree excepted), "committed under such circumstances as would have constituted murder at common law, is murder in the second degree." Rev. Code, § 3653. Blackstone defines murder at common law to be, "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, express or implied." 4 Bl. Com. [195]; 3 Inst. 47. This definition, with such change of phraseology as renders it suitable to the institution and government of this country, is adopted and approved by the courts of the States, and of the government of the United States. Amer. Law of Hom. by Wharton, 33; Med. Jurisp. by Wharton & Stillé, ed. 1855, 664, § 966. This court has declared, that the law of homicide in this State is derived from the common law of England. *Pierson v. The State*, 12 Ala. 149. From this it appears that the sanity or insanity of the accused is involved in the very definition of the offense of murder in all its degrees, and is necessarily a fact which influences the determination of the jury upon the question of guilt or innocence. In the case of *The Commonwealth v. Rogers*, 7 Metc. 500, the evidence showed that Rodgers, the accused, stabbed Lincoln, the warden of the prison in which Rodgers was confined, and killed him, without any provocation whatever. The sole defense was the insanity of the prisoner. SHAW, C. J., stated the law of that case in those words: "In order to constitute a crime, a person must have in-

telligence and capacity enough to have a criminal intent and purpose ; . . . In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him ; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others and a violation of the dictates of duty." S. C., 1 Lead. Cr. Cas. 87, 89.

In the case at bar, the killing was most clearly proven. There can be no doubt about the perpetration of the criminal act. It was done in a manner the most deliberate and cruel, if the accused was of sound memory and discretion at the time the homicide was committed. Then, the defendant would be clearly guilty as charged in the indictment, if he was of sound memory and discretion at the time Todd was killed by him. To show that the accused was not of sound memory and discretion at the time he committed the fatal act that resulted in the death of Todd, evidence was introduced by the defense, tending to show that the prisoner had shot himself in the head some nineteen years before the trial in the court below, which produced "a depression in the skull, and a compression of the brain ;" that after this wound, which was on the right side of the head, the prisoner had been affected with "partial paralysis in his left arm and left leg," up to the day of the trial, and that the wound in the head still remained "sensitive to the touch." Evidence was also offered in the defense, which tended to show, that for several years before the killing, the accused was "a great drunkard ;" that he was "generally drunk ;" his habits were "to drink from a half to one gallon of spirits every night, and large quantities before breakfast, and before dinner, and before supper each day." He "frequently saw sights, such as witches and devils, and imagined that men were after him to kill him." He fancied that "hair grew in the palms of his hands," which he tried to pluck out and in "his mouth, and was choking him ;" and about three weeks before the killing, he had an attack of *delirium tremens*. There was also proof, that, when drunk, he was "a crazy man, wild and furious, and without sense or reason ;" and on the Saturday before the killing, which took place on Monday, "he was seeing witches and devils, and was a wild and crazy man." There was evidence also showing that, on Monday, the day of the killing, "he was in like condition," as on the Saturday before. The evidence for the prosecution tended to show that the killing was wholly unprovoked, and perpetrated in the most deliberate and brutal manner ; that the accused was not totally deprived of memory and discretion at the time of the commission of the act, which constitutes the offense charged. There was no serious conflict in the testimony, except as to the state of mind of the defendant in the court below at the time of the homicide.

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Upon this evidence, the court gave seven charges to the jury, each of which was excepted to by the accused, and incorporated into the record by bill of exceptions. The first of these charges was in these words: "Drunkenness, in itself, was no palliation or excuse." And the fifth charge was in these words: "Upon the evidence, the defendant was guilty of murder in the first degree, or of nothing."

It is said in *Martin v. The State*, 47 Ala. 564, 573, that "where there is any rebutting proof, the court ought so to charge as to recognize its effect." This is particularly so, when the charge is general, and applies to the whole case. Here, the proof tended to show, not only that the accused was drunk, but when drunk was "a crazy man, wild and furious, and without sense or reason;" that on Saturday before the killing on Monday, "he was seeing witches and devils, and was a wild and crazy man;" and on Monday, the day of the killing, "he was in like condition," as he had been on the Saturday before. The first charge of the court above set out ignores all this evidence of mental unsoundness, and seems to take it for granted that, if it existed, it must necessarily be the immediate effects of the defendant's drunkenness. Such a charge is vicious, because it excludes from the jury all the evidence of mental unsoundness, which might or might not be a palliation or excuse for acts which would otherwise be criminal, according to the degree and character of the mental unsoundness. The policy of the law forbids that mere drunkenness alone should do away with the responsibility for crimes. Whart. & Stillé Med. Jurisp. 50, § 66. But, as all crime implies some degree of intelligence in the criminal, the humanity of the law will not sanction the punishment of a person incapable of rational action. *United States v. McGlue*, 1 Curtis' C. C. R. 1; 1 Lead. Cr. Cas. 87, and notes, 93; *Rodgers's case*, *supra*; 1 Russ. Cr. 1, 2. Drunkenness may be said to have two degrees in its effects upon the memory and discretion. The one of these is mere intoxication. No degree of this will palliate or excuse, where it is the effect of the voluntary act of the defendant. *The State v. Bullock*, 13 Ala. 413. Blackstone, and the older authorities say, that drunkenness itself is a crime; and "the law of England, considering how easy it is to counterfeited this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by another." 4 Bl. Com. 25. The other effect of drunkenness is mental unsoundness, brought on by excessive drinking, which remains after the intoxication has subsided. This latter mental unsoundness, if it exists to such excess that the accused loses the government of his reason, may be interposed as a palliation or excuse for crime. *United States v. Drew*, 1 Lead. Cr. Cas.

115 and notes. Here, there was proof not only of excessive intoxication, but also some proof of mental unsoundness, which was separable from mere intoxication. It should, therefore, have been left to the jury to determine whether there was any mental unsoundness which was separable from the intoxication; and if there was, whether it was sufficient to overthrow the defendant's sense of right and wrong. The defendant's drunkenness might be looked to as a means of producing this effect. The charge of the court was calculated to misdirect the jury in making this inquiry. The evidence of insanity of the accused may have been regarded by the learned judge in the court below as very feeble, yet this would not justify a charge, which, in effect, withdrew it from the jury. *Martin v. The State*, 47 Ala. 564.

The second charge above quoted, which is numbered the *fifth* in the bill of exceptions, is erroneous. It is a charge upon the effect of the evidence, without the request of either party. In *Edgar v. The State*, 48 Ala. 312, this was declared to be error. Besides, the charge is not free from contradiction in itself. It is very well calculated to confuse and mislead the jury. The testimony was not wholly free from contradictions. Yet it is founded on the presumption that there was no such contradiction. Doubtless the learned judge intended to charge the jury, if they believed from the evidence that the defendant was merely drunk and not insane, when he committed the act of killing, then he was guilty as charged in the indictment, but, if they believed he was so insane as not to know right from wrong, then he was not guilty. This would have been correct.

The unsoundness of mind which excuses a criminal act, must be of such degree as deprives the accused of the capacity to know right from wrong. Short of this, it does not excuse. 1 Russ. Cr. 9, Sharswood's ed. and notes; *Mosler's case*, 4 Barr, 264.

The monstrous barbarity of the act of killing should not be admitted as a presumption of insanity. *Stark's case*, 1 Strobb. 479.

The judgment of the court below is reversed, and the cause is remanded for a new trial; and the accused, Henry Beasley, will be held to answer the indictment under which he has been arrested, until discharged by due course of law.

Judgment reversed, etc.

Miller v. McWilliams.

MILLER, appellant, v. McWILLIAMS.

(50 Ala 427.)

Municipal corporation — private property cannot be taken on execution again.

The private property of the inhabitant of an incorporated town is not liable to seizure upon an execution against the town.

MOTION for a summary judgment against E. C. McWilliams for failure to collect on execution issued on a judgment held by plaintiff against the town of Camden, which was an incorporated town. The town owned no property and the defendant declined to levy upon the private property of any inhabitants of the town, but returned upon the execution "no property found." The court below refused plaintiff's motion.

Cochran & Dawson, for appellant.

S. J. Oumming, contra.

PETERS, C. J. The question presented by this appeal is, whether the private property of an inhabitant of an incorporated town is liable to be seized on execution issued on a judgment against the town as a corporation, and sold for the satisfaction of such judgment, when the town possesses no property of its own. This seems to be a question heretofore unsettled in this State. In a well-considered case in the Supreme Court of the State of Mississippi, it was settled in that State in 1853, that, where there is no provision in the act of incorporation, which authorized a resort to the individual property of the inhabitants of an incorporated town for the purpose of discharging a judgment against the corporation, then, the private property of the inhabitants of the town could not be seized on execution against the property of the corporation alone. *Horner v. Coffey*, 25 Miss. 434. This is now esteemed to be the better doctrine, outside the New England States. Dillon on Mun. Corp., § 432. The acts incorporating the town of Camden give no power to seize the individual property of its inhabitants, to pay the debts of the corporation. They only authorize a tax to be levied and collected by the corporate authorities for this purpose. Acts of Ala. 1857-1858, 225, § 6, No. 181; Acts 1869, 391, No. 299; Acts 1872-1873, 286, No. 277. It is the duty of such a corporation to provide

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for the payment of its liabilities. *County Commissioners v. Rather*, at June term, 1872; *Ex parte Selma & Gulf Railroad*, 45 Ala. 696. The authority that contracts the debt should attend to its liquidation. After the amount of the liability is fixed by judgment against the corporation, and execution issued on such judgment is returned "No property found," then it becomes the duty of the corporate government to levy and collect such a tax as may be necessary to discharge the judgment thus existing. If they fail to do this, *mandamus* is the proper remedy. *Walkley v. City of Muscatine*, 6 Wall. 481; *Dillon on Mun. Corp.*, § 685, note 4.

Then, the motion against the sheriff in the court below, who refused to levy an execution, issued on a judgment against the town of Camden, on the property of the inhabitants of said town for its satisfaction, was properly overruled and denied.

Besides this, the Constitution of this State declares, that "The General Assembly shall not have power to authorize any municipal corporation to pass any laws contrary to the general laws of the State, nor to levy a tax on real and personal property to a greater extent than two per centum (per annum) of the assessed value of such property." Const. Ala., art. 4, § 36. This, then, by implication, if not directly, forbids the property of the citizens of such corporations to be taken for the payment of the corporate debts or liabilities to an amount above this constitutional limit. The sounder exposition of the law does not permit that a burden, which should be borne equally by all, should be inflicted on one or a few. The payment of the liabilities of a municipal corporation is a common burden, and it is only by taxation that it can be equally distributed. For this purpose, the power to levy a tax is given.

The judgment of the court below is affirmed, with costs.

Judgment affirmed.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

OLD SOUTH SOCIETY IN BOSTON v. CROCKER.

(119 Mass. 1.)

Trust — public charity — sale of trust-property — when court will authorize.

A gift for the erection of a house for public worship, or for the use of the ministry, may constitute a public charity if there is no definite body for whose use the gift was intended, capable of receiving, holding and using it in the manner intended. But where there is a body, or a definite number of persons, ascertained or ascertainable, clearly pointed out by the terms of the gift to receive, control and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone.

Land was conveyed to certain persons named "and to such as they shall associate to themselves, their heirs and successors forever, for the erection of a house for their assembling themselves together publicly to worship God, as also the erection of a dwelling-house for such minister or ministers as shall be by them and their successors from time to time orderly and regularly admitted for the pastor or teacher to the said church or assembly," "and for no other intent, use or purpose whatsoever." *Held*, (1) not to constitute a public charity; (2) that the land so conveyed might be sold by authority of the legislature or of a court of equity; and (3) on an application for a sale of the property, that the vote of a majority of the pew-holders or members of the society was not of itself a sufficient authority to enable the corporation to make the sale, nor a sufficient reason to justify the court in authorizing it to be made; but that those seeking the sale must satisfy the court that it was reasonably required for the accommodation of the society as a whole, and that the proposed change would not subject the minority to an unreasonable sacrifice of interest or convenience, or in any way work injustice to them.

TWO cases were decided together. The first case was a bill in equity by the Old South Society against Crocker and others, members of said society, alleging in substance as follows:

That in 1669 Mary Norton did, for a voluntary consideration and "in confidence of their faithfulness to perform that trust which I shall repose in them," convey certain land in Boston to Thomas Savage and certain others named, "and to such as they shall associate to themselves, their heirs and successors forever, for the erection of a house for their assembling themselves together publicly to worship God, as also the erection of a dwelling-house for such minister or ministers as shall be by them and their successors from time to time orderly and regularly admitted, for the pastor or teacher to the said church or assembly, and for the accommodation of the said dwelling-house for the use of the minister or ministers as shall from time to time be chosen as aforesaid, and for the accommodation of the meeting-house, with convenient passages of ingress, egress and regress for the people, that shall there from time to time assemble as aforesaid, but for no other intent, use or purpose whatsoever."

Thereupon the grantees proceeded to erect a meeting-house and dwelling-house for their minister on said land, and to duly organize a church named "The Third Church of Christ in Boston"—afterward known as "The Old South." In 1677, the same grantor, by a deed reciting the preceding conveyance and the building of a meeting-house on the land by the grantees, conveyed an adjoining piece of land to the six survivors of the persons named in the preceding deed, "and to such as they shall have associated unto them in church fellowship, or shall be associated to them and to their heirs and successors forever, for the ends and purposes in the first above-mentioned deed is fully and amply declared," "with the house already erected thereon for the use of their ministers or ministry, orderly chosen by the said society, being the Third Church of Christ in Boston, from time to time, and at all times forever." Subsequently, the grantor by her will gave to the "Third Church of Christ in Boston" her dwelling-house which adjoined the land before conveyed, "for the use of the ministry in the said church successively forever." The deeds and other writings concerning said house were by the will bequeathed to two of the persons named in the preceding deeds, as trustees for the said church, "for the end and use before declared." In 1845, the proprietors of pews in the church and their successors were made a corporation and authorized to take and hold, to the use of the corporation and its successors and assigns in fee simple, the property held by the church, "for the support of public worship, for parochial and charitable purposes in this Commonwealth, and for paying the debts of said corporation."

The society afterward by a majority vote and after due notice decided to erect a new house of worship in another locality and to abandon the

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Old South meeting-house as a house of worship, and to sell the same and apply the proceeds to the payment of the expense of the new church and to parochial and charitable purposes.

The bill prayed for a decree authorizing the society to sell the said Old South meeting-house.

The defendants, a minority of the pew-holders, claimed that the corporation had no power to dispose of the property, and that a sale thereof would be contrary to the trust and in violation of the conditions thereof.

The case was reserved for the consideration of the full court.

The second case was an information filed by the attorney-general on December 4, 1874, at the relation of the parties defendant in the first case, alleging that the Old South Society held the land conveyed and devised to it by Mary Norton as trustee of a public charity; that by the acts done by the defendant, all of which were set forth at length and were the same appearing in the first case, the defendant had violated its trust, and praying that it be restrained from selling its land, that it should be removed from its said trust and that other trustees be appointed in its stead.

An answer was filed, and the case was reserved by ENDTOTT, J., for the consideration of the full court on the pleadings and a report similar to that in the first case.

B. F. Thomas & L. M. Child, for the Old South Society.

E. R. Hoar & G. O. Shattuck (*E. Gray* with them), for defendants in the first case, and the attorney-general in the second case. 1. The property sought to be sold is held to charitable uses. The object is charitable. Trusts for the support of public worship and religious instruction, either under a liberal construction of the words "repair of churches" in the Stat. 43 Eliz., ch. 4, or by virtue of original equity jurisdiction, have always been held to be charities. *Earle v. Wood*, 8 Cush. 430; *Jackson v. Phillips*, 14 Allen, 539, 552; *Attorney-General v. Pearson*, 3 Mer. 353. The object of the three gifts of Mary Norton, all of which were gratuitous, was the advancement of religion through the erection of a meeting-house for the public worship of God and supplying a dwelling-place for the minister thereof. Gifts to build a church are held charitable. *Dutch Church v. Mott*, 7 Paige, 77; *Beaver v. Filson*, 8 Barr, 327; *Schnorr's Appeal*, 67 Penn. St. 188; *Potter v. Thornton*, 7 R. I. 252; *Meeting St. Baptist Society v. Hail*, 8 id. 234; *Goode v. McPherson*, 51 Mo. 126; *Johnson v. Mayne*, 4 Iowa, 180; *Scott v. Stipe*, 12 Ind. 74; *Hopkins v. Upshur*, 20 Tex. 89; *Davis v. Jenkins*, 3 Ves. & B. 151. So also are

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gifts to build a parsonage. *Sewell v. Crewe-Read*, L. R., 3 Eq. 60; *Cresswell v. Cresswell*, L. R., 6 Eq. 69. The gifts are to Thomas Savage and others "and to such as they shall associate to themselves, their heirs and successors forever." Any persons of the same religious views might become members of the society by buying pews in the church. The society could be no source of pecuniary profit to its members; and the fact that the members paid for their pews can be no objection to its being a charity. *Gooch v. Association for Aged Females*, 109 Mass. 558; *Gass v. Wilhite*, 2 Dana, 170.

The beneficiaries are sufficiently indefinite. It is only necessary that they should take by virtue of their position and not as individuals. A gift otherwise a charity will be none the less so because its benefits are confined to a class of persons who are represented at the time of the gift by certain definite individuals. Thus the following gifts are held to be charities, though there is no uncertainty as to the persons to be immediately benefited: A gift to a priest or minister, by virtue of his office. *Attorney-General v. Cock*, 2 Ves. Sen. 273; *Thorner v. Wilson*, 3 Drew. 345; 4 id. 350; *Attorney-General v. Dublin*, 38 N. H. 459. A gift to a lodge of Freemasons. *King v. Parker*, 9 Cush. 71; *Vander Volgen v. Yates*, 3 Barb. Ch. 242; *Duke v. Fuller*, 9 N. H. 536; *Indianapolis v. Grand Master*, 25 Ind. 518. A gift to a particular religious society. *Earle v. Wood*, 8 Cush. 430; *Dexter v. Gardner*, 7 Allen, 243; *Beatty v. Kurtz*, 2 Pet. 566; *Magill v. Brown*, Brightly, 346, note; *Williams v. Williams*, 4 Seld. 525; *Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch. 186, 237; *Banks v. Phelan*, 4 Barb. 80; *Wright v. Methodist Church*, Hoffm. Ch. 202; *Price v. Maxwell*, 28 Penn. St. 23; *Attorney-General v. Dublin*, 38 N. H. 459; *Gass v. Wilhite*, 2 Dana, 170; *Curd v. Wallace*, 7 id. 190, 192; *Attorney-General v. Jolly*, 2 Strobb. Eq. 379; *White v. University*, 4 Ired. Eq. 19, 20; *Bridges v. Pleasants*, id. 26, 31; *Johnson v. Mayne*, 4 Iowa, 180; *Ward v. Hipwell*, 3 Giff. 547; *Attorney-General v. Gould*, 28 Beav. 485. A gift of land for the purpose, as in this case, of building a particular church. *Dutch Church v. Mott*, 7 Paige, 77, and other cases before cited. In the following recent English cases, legacies for the purpose of building a chapel or parsonage were assumed to be charitable, the only question being whether they came within the Mortmain Act, 9 Geo. II, ch. 36. *Sewell v. Crewe-Read*, L. R., 3 Eq. 60; *Booth v. Carter*, id. 757; *Creswell v. Creswell*, L. R., 6 Eq. 69; *In re Watmough*, L. R., 6 Eq. 272; *Sinnett v. Herbert*, L. R., 12 Eq. 201; S. C., L. R., 7 Ch. 232; *Pratt v. Harvey*, L. R., 12 Eq. 544; *In re Lee*, 21 W. R. 168; 27 L. T. (N. S.) 808.

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Anonymous, 3 Atk. 277, and *Swift v. Easton Beneficial Society*, 73 Penn. St. 362, are sometimes cited as holding certain trusts not to be charities for want of indefiniteness, but they proceeded on other grounds. They are cases of societies in the nature of mutual insurance companies, where each member pays a regular assessment in consideration of relief in case of necessity or illness. They are no more charities than annuity offices or accident insurance companies. They are pecuniary enterprises, and the members make a pecuniary investment expecting to get their money's worth. Such societies may be and often are run at a profit and declare dividends. The legal objection is that their objects are not charitable within the Stat. 43 Eliz., ch. 4. The same objection applies to a gift to a private school (*i. e.* not free), as such schools are pecuniary enterprises, and intended to be run at a profit. *Attorney-General v. Hewer*, 2 Vern. 387; *Attorney-General v. Newcombe*, 14 Ves. 1. But it is no objection that a school exists for the benefit of a restricted class of persons. *Meeting St. Baptist Society v. Hail*, 8 R. I. 234. In *Carne v. Long*, 2 De G., F. & J. 75, the gift was to a body substantially a private library association, and hence not a charity. In *Thomson v. Shakespeare*, 1 De G., F. & J. 399, the court declared that a museum to be established at Shakespeare's house in Stratford could not be brought under any of the classes of charities enumerated in the 43 Eliz., ch. 4. In *Attorney-General v. Haberdashers' Co.*, 1 Myl. & K. 420, the Haberdashers' Company was held to be a trading company and not a charity. In all the foregoing cases the objection was that the object was not charitable, and not any lack of indefiniteness in the beneficiaries. *Thomas v. Howell*, L. B. 18 Eq. 198, is an example of a gift which fails as a charity for want of indefiniteness. The gift was to ten poor clergymen of the Church of England, to be selected by A. B., and was held not a charity, because it was a gift to individuals, and not a perpetuity. The ten clergymen, once selected, would take as individuals, and not by virtue of their office or position.

Every trust is either a charity or else a private trust, which must be limited within a life or lives in being and twenty-one years. So that gifts for the founding and support of Congregational churches in this Commonwealth, if not charities, would be void as perpetuities. *Jackson v. Phillips*, 14 Allen, 539, 550; *Odell v. Odell*, 10 id. 1, 6; *Dexter v. Gardner*, 7 id. 243; *Carne v. Long*, 2 De G., F. & J. 75; *Thomson v. Shakespeare*, 1 id. 399. It seems that such gifts are perpetual trusts of some sort. *In re New South Meeting-house*, 13 Allen, 497; *Second Congregational Society v. Waring*, 24 Pick. 304; *Wheaton v. Gates*, 18 N. Y. 395. There appears to be no reason why a Con-

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gregational religious society should not be "technically charitable," that does not apply equally well to a lodge of Freemasons or a society of Friends. *King v. Parker*, 9 Cush. 71; *Earle v. Wood*, 8 id. 430; *Dexter v. Gardner*, 7 Allen, 243.

When the other requisites of a charity exist, the test is not in the definiteness or indefiniteness of the persons actually receiving a benefit at any one time, but in the intent of the gift. If the intent is to confer a benefit upon the public, or upon a large and indefinite portion of the public, such as a certain denomination of Christians, the fact that the fund is not large enough to benefit all at any one time will not prevent the gift being charitable.

The decision *In re New South Meeting-house*, 13 Allen, 497, is made clearer by calling the corporation a charity. The suggestion of BIGELOW, C. J., in that case, that religious corporations form a third class of trusts which are neither private trusts nor public charities, but *quasi* public, has no foundation in authority. There is no case in this Commonwealth which decides that a gift to a Congregational church is not a charity. In *Attorney-General v. Federal Street Meeting-house*, 3 Gray, 1, the decision is put distinctly on the ground that there was no gift, the grantor selling his land and receiving a pecuniary consideration from the society. *Attorney-General v. Heelis*, 2 Sim. & Stu. 67, 77. The intimation that the beneficiaries of the trust were not sufficiently indefinite for a charity, is wholly immaterial to the decision.

Religious corporations have been recognized as charities by the legislature of this Commonwealth. Stats. 1809, ch. 91, § 4; 1815, ch. 12.

The Old South Society, so far as the deed is concerned, must stand upon the same ground as other religious societies in this Commonwealth which were founded by gift. And if it is for the public good that the worship of God should be maintained, public policy requires that such bodies should be charities. For, if not charities, there is nothing to prevent them from changing themselves by a unanimous vote into trading corporations, from declaring dividends or dividing up their entire property among their members. If any of these things were done, supposing churches not to be charities, the Commonwealth could not interfere through the attorney-general, nor could any private person call them to account, as all interested, both trustees and *caveat que trust*, would have consented to the act. *Attorney-General v. Federal Street Meeting-house*, 3 Gray, 1, 60, 61; *Wheaton v. Gates*, 18 N. Y. 395, 403. Such an absolute power over the church property by the members of a religious society would be greatly to be deplored. For if it was once understood that churches were irresponsible bodies, a congregation whose property

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was large and whose enthusiasm had declined from the loss of a favorite pastor or some other cause, might find it expedient to divide up its property and for the members to join other congregations. Or, being unrestricted in the use of its funds, a congregation might choose to declare a dividend from its surplus income, so that pews would become a profitable investment and the society be reduced to the level of a trading corporation. In this way there would be danger that the number of churches would be diminished, and that many of those that remained might lose their distinctive character. The only safeguard would be the good faith of the congregations, when tempted by a pecuniary gain to which they would have a legal right.

2. Assuming that the deeds and will of Mary Norton created a charity, the act of incorporation (Stat. 1845, ch. 229) continued the original trust. *French v. Old South Society*, 106 Mass. 479, 487. In general, when a charter is granted to a charity already created by private gift, it is presumed that the charter is granted with the intent of carrying out the original trust. *Attorney-General v. Dedham School*, 23 Beav. 350; *Miller v. English*, 1 Zab. 317.

The charter of the Old South Society expressly declares that "said corporation shall be deemed and taken to be the successors of said proprietors." The provision that the corporate funds shall be held "for parochial and charitable purposes" shows that the legislature intended to incorporate a charity. The effect of the charter is, then, to incorporate the proprietors of pews, and one becoming a pewholder under the by-laws of the society thereby becomes a member of the corporation, which holds the legal estate as trustee. The pewholders are also beneficiaries of the charity for the time being. *Second Congregational Society in North Bridgewater v. Waring*, 24 Pick. 304; *Attorney-General v. Federal Street Meeting-house*, 3 Gray, 1, 60, 61. The same persons are therefore at the same time trustees and *cestuis que trust*. But this does not prevent the corporation from being a charity. The same was true in *Thorner v. Wilson*, 3 Drew. 245; S. C., 4 id. 350.

The present pewholders are only a part of the beneficiaries. For the trust is a perpetuity and their successors have an interest in it; and each pew is occupied by many persons besides the owner, his family, friends, lessees or the public, who use it by his license. It is matter of common knowledge that there is rarely more than one owner to each pew, which is nevertheless made to hold five or six persons. So that the original foundation of a church contemplates that the benefits of it shall be enjoyed by a large number of indefinite persons, other than those who have specific legal rights in the property. These two classes of persons

have no present representative of their interests, and it is for this reason that the attorney-general must be made a party, as in all suits concerning the revenues of charities. The injustice of allowing a few proprietors to settle this question for all the present worshipers and for all future generations is clear. It is the common case of a *cestui que trust* being trustee for himself and others, as in *Belknap v. Belknap*, 5 Allen, 466.

But, whatever may be the general principle as to a gift of land to a religious society, it is clear, that under this charter the property, or the excess after paying the expenses of the society, is held for a public charity. If, by the terms of the gift of Mary Norton, it was made a public charity, there is nothing in the charter changing that trust. If, on the other hand, the society, existing prior to the acceptance of the charter, did not hold the property in trust for a public charity, and could by unanimous consent have disposed of it as they pleased, the transfer of it by unanimous consent to the new corporation, to be used in accordance with the charter for charitable purposes in this Commonwealth, created a public charity. If the surplus above what is necessary for the purposes of the society is held for charitable uses, then the public must be represented in any dealing with the property, otherwise the society could decide how much should be devoted to charitable uses, and the public would have no control.

The expression "and for paying the debts of said corporation" applies only to such debts as are not *ultra vires*, and may lawfully be contracted by the corporation. This does not affect the question of what the nature of the corporation is.

WELLS, J. We find no public charity created by either of the three instruments under which title to the premises in question was derived from Mary Norton.

By her deed of April 1, 1669, the legal estate in the land therein described passed to and became vested in the ten persons named as grantees. A trust was declared, however, the beneficiaries of which were the grantees themselves with "such as they should associate to themselves." The further limitation to "their heirs and successors" indicates that the grantor contemplated a permanence of association of the *cestuis que trust*, and intended to convey the fee in the land.

The purposes of the trust, as set forth in the deed, were, 1st, "for the erecting of a house for their assembling themselves together publicly to worship God;" 2d, "the erecting of a dwelling-house for such minister or ministers as shall be by them and their successors from time to time orderly and regularly admitted for the pastor or teacher to

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the said church or assembly; and they are further guarded by the restriction "and for no other intent, use or purpose whatsoever."

Gifts for the erection of a house for public worship, or for the use of the ministry, may constitute a public charity, if there is no definite body, for whose use the gift was intended, capable of receiving, holding and using it in the manner intended. To give it the character of a public charity there must appear to be some benefit to be conferred upon, or duty to be performed towards, either the public at large or some part thereof, or an indefinite class of persons. *Going v. Emery*, 16 Pick. 107, 119; *Perry on Trusts*, § 710; *Saltonstall v. Sanders*, 11 Allen, 446. But when there is a body, or a definite number of persons, ascertained or ascertainable, clearly pointed out by the terms of the gift to receive, control and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone. *Attorney-General v. Federal Street Meeting-house*, 3 Gray, 1, 49; *Parker v. May*, 5 Cush. 336.

The deed of Mary Norton clearly contemplated that the grantees and their associates then formed, or were about to form, a voluntary religious society; and it was for the use and benefit of such society, in the promotion and convenience of the religious exercises and public worship to be maintained and conducted by and for themselves, that her gift was made to aid in providing a house for those religious exercises, and also a house for the residence of such person as should at any time serve them as their minister. *Attorney-General v. Merrimack Manuf. Co.*, 14 Gray, 586, 602.

The *cestuis que trust* were indeed an indefinite number of persons, in the sense that there was no fixed number to whom the designation of "associates" would apply; and they were doubtless intended to include all who should, in accordance with what might be adopted as the rules of association or organization, at any future time become members of the society; and thus the enjoyment would be continued perpetually. A trust so constituted is capable of serving these shifting interests in the beneficiaries (*Second Congregational Society in North Bridgewater v. Waring*, 24 Pick. 304; *King v. Parker*, 9 Cush. 71, 82), and is not obnoxious to the rule of law against perpetuities which prevent alienation; because the entire interest at any time is represented by known persons living; to wit, the legal estate by the trustees, there being always power in the court, in case of necessity, to supply trustees in whom the estate will vest; the equitable interest by those persons who then constitute the body of the associates or the society, who may be ascertained according to its rules governing membership.

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The character and purposes of the association named as *cestui que trust*, and the designation of the religious uses for which the property was given, do not necessarily indicate an intent to create a public charity. Such an implication sometimes arises from the character of the body to which the gift is made, or from the publicly avowed purposes of its organization and action; as in the case of *Tucker v. Seaman's Aid Society*, 7 Mett. 188; Concord Female Charitable Society in New Hampshire, *Washburn v. Sewall*, 9 id. 280; American Board of Commissioners for Foreign Missions, *Bartlet v. King*, 12 Mass. 536; American Education Society and American Bible Society, *Burbank v. Whitney*, 24 Pick. 146; *Bliss v. American Bible Society*, 2 Allen, 334.

Property held in trust for a Monthly Meeting of Friends seems to have been regarded as a public charity in *Earle v. Wood*, 8 Cush. 430, and in *Dexter v. Gardner*, 7 Allen, 243; and for a lodge of Freemasons, in *King v. Parker*, 9 Cush. 71. But neither of those cases was a proceeding which concerned the administration of a charity, as such. They were suits in equity relating to trusts, in which the rights of private parties alone were represented. There was no public charity declared in either case, and no adjudication which necessarily involved or was based upon the existence of a charitable trust.

A fund, to be dispensed exclusively by way of mutual benefit or aid among the members of an association, is a private and not a public charity. 8 Gray, 50; 11 Allen, 464. It may well be questioned, therefore, whether all the conditions requisite for a technical public charity were present in the case of *King v. Parker*, cited above.

Conceding that "monthly meetings," embracing as they do the entire community of people called "Friends," are so indefinite and general, and the purposes of their organization such that gifts in trust for their use will constitute strictly a public charity, still there is a marked distinction between such bodies and a congregational poll parish or society of defined, regulated, and, therefore, limited membership.

Property devoted to the support and maintenance of public worship, which is public only in the sense that it is open to the public by courtesy, in accordance with the usual practice of all churches in this Commonwealth, does not thereby become a public charity. 8 Gray, 50; 14 id. 602; *Attorney-General v. Trinity Church*, 9 Allen, 422. Perry on Trusts, § 732. The deed of Mrs. Norton undoubtedly contemplated public worship of that character, but she intrusted its administration and limited the legal right of enjoyment to those who should become associated with her grantees, and their successors, and thus constitute a poll parish or religious society.

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The fact that it is carefully restricted to religious uses, as already suggested, does not alone give it the character of a public charity. *Wells v. Heath*, 10 Gray, 17. As a trust, the whole estate passed from the grantor. There is reserved no right of defeasance and reverter or limitation over in case of a disregard of the restriction; and if there were, it would not avail to transfer the use or to convert it from a private to a public charity. *Brattle Square Church v. Grant*, 3 Gray, 142; *Wells v. Heath*, 10 id. 17; *Drury v. Natick*, 10 Allen, 169, 183.

The deed of June 30, 1677, does not give rise to any materially different question. It conveys an adjoining estate to the six survivors of the trustees named in the previous deed, and to such as have been "or shall be associated, to them and their heirs and successors forever, for the ends and purposes in the first-above mentioned deed of April the first, 1669, is fully and amply declared," with the house already erected thereon, "for the use of their ministers or ministry orderly chosen by the said society, being the Third Church of Christ in Boston, from time to time and at all times forever." This is not a provision for a ministry at large, or a ministry independent of the society; but is for the benefit of the society by enabling them to provide for the support and convenient residence of such persons as they might employ to serve them as their minister. *Wells v. Heath*, 10 Gray, 17, 23.

The will devises her own house to the "Third Church of Christ in Boston," naming, as trustees, two only of the persons who were trustees under her previous deeds. The devise is manifestly intended to be in furtherance of the same objects as the conveyances by deed, and for the use of the same beneficiaries, although differently designated. It is declared to be "for the use of the ministry in the said church successively forever." The reasons for making the gift, assigned by her, especially in connection with the previous deeds, show that it was intended, like the conveyances, for the benefit of the religious society formed by her trustees, their associates and successors, and exclude the idea of a more general public charity.

By the Stat. of 1845, ch. 229, the proprietors of pews in the "Old South Meeting-house" and their successors were made a corporation, and authorized to take and hold, to the use of said corporation, in fee simple, the property then "known as the estate belonging to the Old South Church and Society." It is not disputed that these corporators were the proper successors of Mary Norton's grantees and devisees and their associates who constituted the "Church or Assembly" designated by her as the "Third Church of Christ in Boston." They therefore represented the *cestui que trust*, and were entitled to the beneficial in-

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terest in the estate. Precaution not having been taken to preserve a succession in the trustees for the transmission of the legal title, that remained nominally in the heirs of the survivor of the original trustees named by Mary Norton. By the act of incorporation, that title also was made to vest in the corporate body. It was manifestly not the intention of the legislature that an absolute merger of the two interests should result so as to discharge the estate from the trusts with which it had been impressed. It was accordingly declared that it should continue to be held "for the support of public worship, for parochial and charitable purposes in this Commonwealth, and for paying the debts of said corporation." But this declaration of uses does not define a public charity, even if it were competent for the legislature to constitute or declare one out of a trust where it did not exist before. Perry on Trusts, § 711.

We cannot doubt that lands so held may be sold by authority of the legislature (*Stanley v. Cok*, 5 Wall. 119, 169); or of this court as a court of equity, charged with the supervision and enforcement of trusts. under the Gen. Stats., ch. 100, § 16. We do not find, in the special circumstances and character of the authority conferred by the charter to hold this particular real estate, any inhibition of the usual power of sale by leave of the court, which attaches to trust estates generally. And the special authority to apply to this court, contained in the Stat. of 1874, ch. 270, would seem to remove any inhibition which might otherwise be implied from the character of the original act or charter. But we think it is equally clear that the vote of a majority of the pewholders or members of the society is not of itself a sufficient authority to enable the corporation to make the sale, nor a sufficient reason to justify this court in authorizing it to be made. The trust is one in which each individual member of the society has an interest as an intended beneficiary, and a right to be heard upon the question of the proper administration of the trust in reference to its original character and purpose, and the effect of the proposed change upon all the members, the minority as well as the majority. It is incumbent upon those who seek to make the change to satisfy the court that it is reasonably required for the accommodation of the society as a whole, and that the proposed change will not subject the minority to an unreasonable sacrifice of interest or convenience, or in any way work injustice to them. The respective rights of the corporation and of its individual members in respect of such property are so fully set forth in the case *In re New South Meeting-House in Boston*, 13 Allen, 497, as to require no further discussion here, in advance of the hearing which must be had to develop the grounds that may exist for or against the proposed sale.

Whitcomb v. Converse.

Upon that hearing, the alleged abuse by the corporation, or by the majority, in using the trust funds to build a meeting-house elsewhere, and in resorting to that house for the meetings of the society for public religious worship, will have such weight as it is entitled to have. If, as the minority contend, it deprived the majority of all standing as members of the society and beneficiaries of the trust, so that those who desire to remain and continue the maintenance of public worship in the house upon the original site may be regarded as constituting the body of the society, entitled both to the corporate franchise and the beneficial enjoyment of the trust estate; or if it warrants and requires that the court should remove the trustee and place the estate in the charge of new trustees, to secure the accomplishment of the original purpose of the donor, neither of these results can be reached by either of the present suits: not by the information by the attorney-general, because that is based exclusively upon the supposed character of the trust as a public charity, which is not sustained; not by the bill in equity, because no decree in favor of the minority can be made in that, except to refuse to authorize the sale or declare a right to sell.

The objection that no right was shown to institute the bill in equity in the name and behalf of the corporation was not urged at the argument, and we regard it as waived. That to the non-joinder of the attorney-general fails, of course, with the information itself.

The result is that the information by the attorney-general must be dismissed, and the bill in equity must stand for hearing before a single justice.

Ordered accordingly.

WHITCOMB v. CONVERSE.

(119 Mass. 38.)

Partnership — capital stock — loss — contribution.

Articles of copartnership between A, B, C, and D, for the transaction of a commission business, provided that A and B should contribute the whole capital in unequal proportions; that A should contribute "such time as he may be able to give;" that B, C, and D, should each contribute all their time to the business; that each partner should receive one-fourth of the net profits; and that A and B should receive interest on the capital contributed by them. The partnership was afterward dissolved by mutual consent, the business of the firm closed by B, and it resulted in a loss. *Held*, on a bill in equity by B against the other partners, that the capital constituted a debt of the partnership to which all the partners were bound to contribute equally, and that, one of them being insolvent, the loss was to be borne equally by the other three.

BILL in Equity by Whitcomb, a partner in the late firm of Converse, Whitcomb & Co., against Converse, Stanton and Blagden, the other partners, to compel contribution to make good the losses of the said firm.

The articles of partnership were as follows :

"Terms of agreement of copartnership for the transaction of a dry-goods commission business in New York and Boston between the undersigned, to commence the second of January, 1871, and continue one year, under the firm name of Converse, Whitcomb & Co.

"J. C. Converse to contribute twenty-five thousand dollars ; to receive interest on the same at 7 per cent, and devote such time as he may be able to give ; to receive 25 per cent of net profits.

"J. M. Whitcomb to contribute fifty thousand dollars, receive 7 per cent interest on the same ; to give all his time to the business, and receive 25 per cent of the net profits.

"E. R. Blagden to contribute all his time to the business, and receive 25 per cent of the net profits.

"Walter Stanton to contribute all his time to the business, and receive 25 per cent of the net profits.

"J. C. Converse and E. R. Blagden to attend to the business in Boston. J. M. Whitcomb and Walter Stanton to attend to the business in New York. Each partner shall be allowed to draw only \$500 per month for personal expenses."

Hearing before COLT, J., who reported the case for the consideration of the full court in substance as follows :

The plaintiff contributed \$25,000 of the amount mentioned in the agreement to be contributed by him.

The partnership was dissolved by mutual consent on March 9, 1871, and the plaintiff was authorized in the agreement of dissolution to settle up the affairs of the firm. He did so, and there resulted therefrom a loss, as he contended, of \$25,000, more or less, being less than the amount of the capital to be put in by the plaintiff ; but whether the loss in question was a partnership or individual loss, is one of the questions reserved as hereinafter stated. The defendant Blagden, at the time of the dissolution, was, ever since has been, and now is, insolvent and unable to pay any part of said loss. Whitcomb, Converse, and Stanton have each paid back to the firm all sums drawn out by them, respectively, for personal expenses, under provision therefor in the memorandum, and Stanton, when he entered the firm, had the control of the business of certain woolen mills, and brought this into the firm ; and he testified, without contradiction, that he brought the bulk of the business to the firm.

The defendant Stanton contended, that he was not liable to make good any portion of the capital contributed to the business by the plaintiff, and expended in paying partnership debts, and that, if liable, he was not liable to make good the share which Blagden would have contributed, but for his insolvency, or any part of said share.

The cause was reserved upon the foregoing facts and evidence. If the court shall be of opinion that the plaintiff is entitled to any contribution to said loss from either of the defendants, the cause is to be referred to a master to ascertain the amount thereof. If he is not entitled to recover from either of the defendants, the bill is to be dismissed as to such defendant.

C. T. Russell, for plaintiff.

G. O. Shattuck & O. W. Holmes, Jr., for defendant Stanton,—(1) The plaintiff cannot recover of his former partners for a loss of the capital stock contributed by him. *Barfield v. Loughborough*, L. R., 8 Ch. 1; *Everly v. Durborow*, 1 Leg. Gaz. Rep. 127, per SHARSWOOD, J.; *Cameron v. Watson*, 10 Rich. Eq. 64, 101, 102, 103; *Heran v. Hall*, 1 B. Monr. 159; Lindl. Part. (2d ed.) 790, 791; Story on Part., § 26, note, citing and approving Rutherford Inst., Bk. 1, ch. 18, §§ 32, 35; Watson on Part. 57; Parsons on Part. 51. The case is different from one where a partner advances money to his firm which he was not required by the articles to contribute, or where one partner advances all the money for a single venture and the other is to take half the profits and contribute neither labor nor funds. *Norvell v. Norvell*, L. R., 7 Eq. 538. (2) If the defendant is liable, he is not to make good any part of what another partner cannot pay. Parsons on Part. 477; *Ex parte Watson*, Buck, 449.

GRAY, C. J. In the absence of controlling agreement, partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital, and the other nothing but his labor or services. 3 Kent's Com. 28, 29. Whether a loss of capital is a partnership loss, to be borne by all the partners, depends upon the nature and extent of the contract of partnership.

If, as is not unfrequently the case in a partnership for a single adventure, the mere use of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual partner to whom it originally belonged, any loss or destruction of it falls upon him as the owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in con-

sideration thereof. Story on Part., §§ 27, 29; *Heran v. Hall*, 1 B. Monr. 159.

But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter; a corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it; such payment cannot indeed be demanded during the continuance of the partnership, nor are the contributors, in the absence of agreement or usage, entitled to interest, but if the assets of the partnership, upon a final settlement, are insufficient to satisfy this obligation, all the partners must bear it in the same proportion as other debts of the partnership. *Julio v. Ingalls*, 1 Allen, 41; *Bradbury v. Smith*, 21 Me. 117; *Barfield v. Loughborough*, L. R., 8 Ch. 1; *In re Anglesea Colliery Co.*, L. R., 2 Eq. 379, 387; S. C., L. R., 1 Ch. 555; *Nowell v. Nowell*, L. R., 7 Eq. 538; *In re Hodges' Distillery Co.*, L. R., 6 Ch. 51, 56; 1 Lindl. on Part. (3d ed.) 696, 827, 828.

Only two cases were cited in the learned argument for the defendant Stanton, in which opinions inconsistent with this view have been expressed.

The one is *Everly v. Durborow*, 1 Leg. Gaz. Rep. 127, a *nisi prius* decision, with no reference to authorities, except an early edition of Lindley on Partnership, which has been corrected by the learned author, *ubi supra*, conformably to the adjudged cases.

The other is *Cameron v. Watson*, 10 Rich. Eq. 64. That was a bill in equity to settle the affairs of a partnership, to which Cameron had contributed labor and Watson capital. The master to whom the case was referred, allowed the claim of Watson for so much of the capital as he had not withdrawn during the continuance of the partnership, but disallowed his claim for interest thereon. pp. 68, 73. Cameron excepted to the allowance of Watson's claim for capital, and Watson excepted to the disallowance of interest. The chancellor, before whom the exceptions were heard in the first instance, overruled the exception of Cameron, and also that of Watson as regarded interest before the dissolution of the partnership, but sustained it so far as to allow him interest after the dissolution. pp. 88-90, 95, 96. The Court of Appeals, although in one part of its opinion appearing to discountenance Watson's claim for capital, ended by confirming the master's report in every particular. pp. 103, 107, 108. So that the final judgment, while it disallowed Watson's claim for interest, established his claim for capital, and was in exact accordance with our conclusion.

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In the case at bar, the partnership was not for a single enterprise, but for the transaction of a commission business in New York and Boston for a year. Converse and Whitcomb contributed the whole capital, in unequal proportions. Converse was to contribute "such time as he may be able to give;" and Whitcomb and the other two partners, Blagden and Stanton, were each "to contribute all his time to the business." Those partners who contributed the capital did not contribute merely the use thereof, but the capital itself, and were by express agreement to receive interest thereon at rates specified in the articles of copartnership. The partners were by agreement to receive each one-fourth of the net profits, and by implication of law must share the losses in the same proportion. The capital contributed became the property of the partnership; and the partnership, consisting of all the partners, became liable to Whitcomb and Converse respectively for the amount of capital paid in by them.

Blagden, one of the partners, being insolvent and unable to discharge any part of the obligation, it must rest in equity upon the three solvent partners in equal proportions. *Whitman v. Porter*, 107 Mass. 522; 1 Lindl. on Part. 789, 790.

Decree for the plaintiff accordingly.

DAMON V. INHABITANTS OF SCITUATE.

(119 Mass. 66.)

Action — for negligence — contributory negligence — violation of statute.

In an action against a town for injuries sustained by a defect in a highway, held, that the fact that plaintiff was at the time traveling on the wrong side of the road in violation of the statute, did not as matter of law defeat the action if his own fault or negligence did not contribute to the injury; but that it was competent evidence of negligence on his part for the jury. (*See note, p. 317.*)

TORT for injuries to plaintiff's person and property by reason of a defect in defendant's highway.

At the trial in the Superior Court, before ROCKWELL, J., it appeared that the injuries were sustained by the carriage going off of a bridge over a culvert, the bridge not being protected by a railing, while the plaintiff, who was driving, was attempting to pass, on the right hand side of the road, another carriage traveling in the same direction.

There was no evidence that the plaintiff requested the other carriage to give him room to pass, and its driver being called by the plaintiff *tes*

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tified without contradiction, that the first he knew of the plaintiff's whereabouts, was that he heard the sound of wheels on the stones ; directly saw the plaintiff's horse abreast of him ; thought there was not room for him to pass ; turned his own horse to the left, and immediately heard a crash.

The defendant called the attention of the court to and read the Gen. Stats., ch. 77, §§ 2, 4, and asked the judge to instruct the jury as follows :

"That the plaintiff, to maintain his case, must show that he was in the exercise of due care ; that attempting to pass the carriage on the right hand side of the road is evidence tending to show want of due care, and, unless justification thereof is shown, is conclusive evidence of want of such care.

"That the plaintiff, to maintain his case, must show that he was in the exercise of due care ; that attempting to pass the carriage on the right hand side of the road is evidence tending to show want of due care, and, unless justification therefor is shown, is conclusive evidence of want of such care ; and that the burden of showing such justification is upon the plaintiff.

"That the town is obliged to maintain its road only for persons lawfully traveling thereon ; that the plaintiff at the time the accident occurred was not lawfully traveling on the defendant's road, and the defendant is not responsible for any injuries at such time received by him."

The judge declined so to instruct the jury, and among other instructions not objected to, instructed them as follows : "That the plaintiff, to maintain this case, must show that he was in the exercise of due care, and must also show that the defendant was guilty of negligence ; and that the accident was due to its negligence alone, and that he in no wise contributed to it ; that the jury, upon the question of due care on the part of the plaintiff, will consider the evidence in relation to his passing to the right of the preceding carriage, and whether or not the attempt to pass on that side is evidence of the want of due care ; but in determining that question for the purposes of this case, the statute alluded to and read is immaterial, and the question is to be determined as if no such statute existed."

The jury found for the plaintiff ; and the defendant alleged exceptions.

P. E. Tucker (*B. W. Harris* with him), for defendant.

J. D. Long, for plaintiff.

GRAY, C. J. The question at issue in this case was whether the injury to the plaintiff was caused solely by a defect in the highway, and in no part by his own negligence.

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The mere fact that he was traveling on the wrong side of the road, in violation of the statute, did not as matter of law defeat this action, if his own fault or negligence did not contribute to the injury. But it was competent evidence of negligence on his part to be submitted to the jury. *Smith v. Gardiner*, 11 Gray, 418; *Spofford v. Harlow*, 3 Allen, 176; *Jones v. Andover*, 10 id. 18, 20; *Steele v. Burkhardt*, 104 Mass. 59, 61; S. C., 6 Am. Rep. 191.

The instruction of the learned judge, that the statute was immaterial, and that the case was to be determined as if no such statute existed, was therefore erroneous, in withdrawing from the consideration of the jury an element which, if they had been permitted to consider it, might have had some weight in their determination of the question whether the plaintiff, in attempting to pass the other carriage on the wrong side of the road, used such care as was required of him under the circumstances in which he found himself.

Exceptions sustained.

NOTE.—See also *Baker v. Portland*, 58 Me. 199; S. C., 4 Am. Rep. 274; *Cratty v. Bangor*, 57 Me. 423; 2 Am. Rep. 56; *McClary v. Lowell*, 44 Vt. 116; 8 Am. Rep. 366; *Sutton v. Wauwatosa*, 29 Wis. 21; 9 Am. Rep. 534; *Fettal v. Middlesex R. R. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *McGrath v. Merwin*, 112 Mass. 467; 17 Am. Rep. 119; *Carroll v. Staten Island R. R. Co.*, 17 Am. Rep. 221; *Winchell v. Cary*, 15 id. 151; *Frost v. Plumb*, 16 id. 18; *Johnson v. Town of Irasburgh*, 19 Am. Rep. 111; *Connolly v. Boston*, id. 396; *Doyle v. Lynn*, etc., id. 431.—RKP.

 THOMAS V. BUILDERS' MUTUAL FIRE INSURANCE COMPANY.

(119 Mass. 121.)

Insurance — double insurance — when policy not avoided by.

A policy of insurance, conditioned to be void in case of other insurance without the consent of the company, is not avoided by the taking of a subsequent invalid policy, *i. e.*, which is invalid by reason of the non-compliance with a condition against the existence of any other insurance without the consent of the insurer; and the assured may set up the invalidity of the second policy in an action by him upon the first policy, although he has received payment of the second policy from the insurer. (*See note*, p. 319.)

CONTRACT upon a policy of insurance against fire, issued by the defendant to the plaintiffs. At the trial in the Superior Court, the defendant declined to argue the case to the jury under the instruction of the presiding judge, submitted to a verdict for the plaintiffs, and alleged

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exceptions to the rulings of the judge and to his refusal to rule as requested, the substance of which appears in the opinion.

W. F. Slocum, for defendant.

S. B. Ives, Jr., for plaintiffs.

DEVENS, J. Many questions which were discussed at the trial and also at the hearing at bar need not be considered, as there is one ground which we deem to be conclusive against the defense here sought to be established.

The policy of insurance, issued by the defendant upon December 13, 1872, and taking effect on that day, was for the term of three years, and contained the express condition "that if the assured shall have made or shall hereafter make any other insurance upon said property without the knowledge or consent of this company in writing, then in such case this policy shall be void."

On December 19, 1872, a policy of insurance was issued to the plaintiffs by the Merrimack Mutual Insurance Company, upon certain property of the plaintiffs for the term of five years. The loss occurred within the time included in both policies. The defendant offered evidence to prove that the latter policy with other property covered also the property insured by the defendant which was destroyed by fire, and contends that as there was no knowledge of or consent to such reinsurance there can be no recovery upon the policy here sued on.

Assuming the defendant to have proved that the property insured by it was covered by the instrument issued by the Merrimack Company as a policy, it is for the defendant to show that such instrument was a valid and legal policy, effectual and binding upon the insurers. If it was invalid so far as the property in question was concerned, there would by legal intendment be no second insurance upon it, and therefore no avoidance of the first policy.

The policy of the Merrimack Company was also upon the condition "that without the consent of this company no other insurance shall exist" upon the property insured by it, and no such consent was given. The Merrimack Company was to have been the subsequent insurer of this property (if it was in terms covered by its policy), and the plaintiffs therefore failed to do what was necessary in order that a contract might be perfected with it, and having effected no valid subsequent insurance, they have not avoided the prior policy with the defendant. The whole question comes clearly within the decided cases. *Jackson v. Massachusetts Mutual Fire Ins. Co.*, 23 Pick. 418; *Clark v. New England*

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Mutual Fire Ins. Co., 6 Cush. 342; *Hardy v. Union Ins. Co.*, 4 Allen, 217.

Nor is the fact the plaintiffs have received payment from the Merrimack Company upon their policy important in this connection. The inquiry here is simply whether there was a valid insurance at the time, and this is not affected by what the plaintiffs or the Merrimack Company saw fit to do afterward. Those acts can in no way have affected injuriously the defendant, so as to estop the plaintiffs from asserting that there was no valid policy issued by the Merrimack Company, nor can they alter the rights of the parties. *Hardy v. Union Ins. Co.*, *ubi supra*, *Bardwell v. Conway Ins. Co.*, 118 Mass. 465; *Philbrook v. New England Ins. Co.*, 37 Me. 137.

Exceptions overruled.

NOTE.—See *Gee v. Cheshire County Mutual Ins. Co.*, *ante*, p. 171. In *Hubbard v. The Hartford Fire Insurance Co.* (33 Iowa, 325), 11 Am. Rep. 125, the court gave the following as the general principle of law upon the point in the foregoing case: "In order to avoid a policy on account of a subsequent insurance against an express condition therein, it must appear that such subsequent insurance is valid and that the policy upon which it is made is capable of being enforced. If it cannot be enforced it is no breach of the prior policy" — and the following cases were cited as sustaining such principle: *Jackson v. Mass. Mut. Ins. Co.*, 23 Pick. 418; *Clark v. New England Ins. Co.*, 6 Cush. 343; *Gale v. Belknap Ins. Co.*, 41 N. H. 170; *Stacy v. Franklin Ins. Co.*, 2 Watts & Serg. 506; *Philbrook v. New England Mut. Ins. Co.*, 37 Me. 137; *Schenck v. Mercer Co. Mut. Ins. Co.*, 4 Zab. 447; *Jackson v. Farmers' Ins. Co.*, 5 Gray, 52.

The case of *Philbrook v. The New England Mut. Ins. Co.*, *supra*, went to the full extent of the principal case, and held that the prior policy is valid, even though the subsequent policy is not avoided by the underwriter issuing it but the loss thereon is paid.

Flanders says (*Fire Ins.* 57): "It is well settled that if the second policy against which the contract stipulates is itself a void one, or one that cannot be enforced, it does not avoid the first, notwithstanding the clause of forfeiture," and he cites — in addition to the cases given above — *Obermeyer v. Globe Mut. Ins. Co.*, 43 Mo. 573; *Forbes v. Agawam Ins. Co.*, 9 Cush. 470; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520.

But in *Hubbard v. Hartford Fire Ins. Co.*, *supra*, the court said (p. 130): "The doctrine which we recognize here is based upon the fact that the subsequent policy was treated and considered as avoided by the company issuing it as soon as it had notice of the prior insurance. In our view this is a most important consideration, for, if the underwriter in the second policy does not treat it as avoided, it cannot be so considered by the insured or the company issuing the prior policy. The condition against prior insurance in the subsequent policy is for the benefit of the insurer, who may at his option waive it or insist upon enforcing its terms. If he seeks to enforce the condition and treats the policy as a void contract, it is indeed difficult to see upon what grounds it may be regarded as valid, as an insurance that will defeat the prior policy."

In *Mitchell v. Looming Ins. Co.*, 51 Penn. St. 402, the policy stipulated that "The aggregate amount insured shall not exceed two-thirds of the estimated cash value." Held, that policies void *ab initio* did not constitute insurance; but policies that were at any time valid were to be treated as such.

In *Continental Ins. Co. v. Horton*, 28 Mich. 173, it was held that a provision in a

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policy against double insurance is not violated by a prior policy in another company which was known to both parties while the policy in suit was being negotiated, and which, it was fully understood between them, was to be canceled if the second policy was taken, and which was in fact canceled, if not actually before the manual reception of the second policy, at least contemporaneously with its complete and effective delivery.

In *Hand v. Williamsburgh City Ins. Co.*, 87 N. Y. 41, the policy stipulated, "Other insurance permitted without notice until required;" "if any other insurance has been or shall hereafter be made upon the said property not consented to by this company in writing hereon * * * this policy shall be null and void. In case of loss the insured shall not recover on this policy any greater portion of the loss or damage sustained to the subject insured than the amount hereby insured shall bear to the whole amount insured on the said property." At the time this policy was made there was another policy in favor of the insured, which covered this and other property, "loss, if any, payable to K." But that policy prohibited other insurance without consent of the company, which was not obtained to this insurance. The defendants, however, had notice of such prior policy. *Held*, that defendants were liable for the whole amount of the loss, for there was in law no other insurance.

In *Bigler v. The New York Central Ins. Co.*, 22 N. Y. 402, the policy was conditioned to cease and be of no further effect if the insured "shall hereafter make any other insurance and shall not, with all reasonable diligence, give notice" thereof to the defendant. The plaintiff, the insured, did "make other insurance" without giving notice, and a loss occurring, the subsequent insurance was paid. The Court of Appeals held, two judges dissenting, that the policy issued by defendant was avoided by the act of making another insurance irrespective of the question whether the subsequent policy might legally have been resisted or not. The opinion took the further ground, that a policy containing a condition against subsequent insurance is avoided by the taking of another policy "whether the latter policy was void or voidable merely. The Massachusetts cases and that of *Philbrook v. The New England Fire Ins. Co.*, *supra*, were considered and disapproved, while the case of *Carpenter v. The Providence Washington Ins. Co.*, 16 Pet. 495, was cited as a direct adjudication on the question and its conclusion was followed. But as is pointed out in *Hubbard v. The Hartford Fire Ins. Co.*, *supra*, if such a conclusion was reached in the *Carpenter* case it was *obiter*.

In Georgia the Revised Code provides that, "A second insurance on the same property, without the consent of the insurer, voids his policy," and the court held under the provision, that the policy was voided, even though the second insurance, valid upon its face, is voidable by the second company on the ground of the failure of the insured to give it notice, at the time the policy was procured, of a prior insurance of the same property in another company. The court expressly refrained from stating what its conclusion would have been had the question arisen on the contract, instead of upon the statute. But, *arguendo*, it said: Now, it is just as entirely within this public policy to have a second insurance, which one *thinks* is good as to have one which is really good. The danger of a burning is the same in both cases — nay, the very fact that one has fraudulently procured an over-insurance is, *prima facie*, a suspicious circumstance. The public evil, which the law intended to prevent, is just the same, perhaps greater, if the second insurance be a fraudulent one. Technically, it may be true that there is no second insurance; but to give this construction to the statute, would, as it seems to us, be indeed sticking in the bark. Such is not the usual mode of construing even criminal statutes. Our law against bigamy provides a punishment for one who *marries* having at the time another wife living. But, says this mode of reasoning, the second marriage is void, one cannot *marry* with a wife living. So, too, we make it penal to alter a promissory note; yet, in fact, the alteration is void, and if *detected* can hurt no one." *Lackey v. Georgia Home Ins. Co.*, 42 Ga. 456.

A subsequent valid policy unquestionably avoids a prior one conditioned against other insurance. *Burt v. People's Mutual Fire Ins. Co.*, 2 Gray, 397; *Illinois Fire*

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Ins. Co. v. Fitz (53 Ill. 151), 5 Am. Rep. 38. So in *Shurtleff v. Phoenix Ins. Co.*, 57 Me. 137, it was held that where one of the conditions, in a policy of insurance against fire, is that the policy shall become void, "if any other insurance shall thereafter be made upon the property, and not consented to by the company, in writing thereon," and, in case of an action thereon, it appears that at the time of the loss there was an insurance beyond the amount allowed, the insured will not be entitled to recover in the absence of proof of a waiver of the condition.

In *Fabyan v. Union Mut. Ins. Co.*, 43 N. H. 203, the charter, which was made part of the contract, prohibited other insurance without consent, and it was held that other insurance avoided the policy, although the clause of the charter prohibiting it was not known to the insured nor contained either in or on the policy.

A stock of goods was insured by a policy conditioned against other insurance. The company afterward consented that the goods should be removed into an adjoining store wherein the insurer had other goods of the same kind which were insured in another company, of which fact the defendant had no notice. *Held*, not other insurance. *Foss v. Hamilton Mut. Ins. Co.*, 39 Barb. 302. But in *Washington Ins. Co. v. Hayes*, 17 Ohio St. 432, A. had goods in store at B. and at C., insured by separate policies. The policy on the goods at B. prohibited other insurance, but the company consented to transfer the policy to insure the goods at C. and the goods were removed to C. and mingled with the stock there. The policy on the stock at C. covered "Accruing Stock." *Held*, that the policy written on the goods at C. was other insurance upon the goods removed from B.; and that the policy on such goods was void. So, where a policy on a stock of goods prohibited other insurance, and the insured purchased another stock of goods upon which there was a policy, and took an assignment thereof and mingled the two stocks, *held*, other insurance. *Walton v. Louisiana State M. & F. Ins. Co.*, 2 Rob. (La.) 563.

A policy on a store conditioned against other insurance thereon, "or any other property connected with it," was held not avoided by subsequent insurance on the stock in the store, it not being "connected" with the store. *Jones v. Maine Mut. Ins. Co.*, 13 Me. 155.

The insurers had notice of a prior policy but were informed that it would not be renewed. It was renewed and no notice given. *Held*, other insurance within the clause. *Deitz v. Mound City M. F. Ins. Co.*, 38 Mo. 85.

As to what constitutes other insurance as to apportionment of loss it was held in *Oyden v. The East River Ins. Co.*, 50 N. Y. 388 (overruling *Honcard Ins. Co. v. Scribner*, 5 Hill, 298), that where property is insured by a policy containing the usual clause for apportionment of the loss in case of other insurance, and the same property is covered by another policy which also includes other parcels, all insured together for a lump sum, this constitutes other insurance within the meaning of such clause.

Such condition is not voided by other insurance made by a stranger to the policy: as where insured held under a contract for a deed and the "other insurance" was obtained by the owner of the legal estate. *Ætna Ins. Co. v. Tyler*, 16 Wend. 385; *Rouley v. Empire F. I. Co.*, 36 N. Y. 550; S. C., 4 Abb. Dec. 131; so, where a third person interested in the property had previously obtained insurance in the name and for the benefit of the plaintiffs; but they, in ignorance of the fact, procured the policy sued on. *Held*, not other insurance. *Nichols v. Fayette Mut. Fire Ins.*, 1 Allen, 63; so the insurance of one mortgagee is not affected by other insurance by another mortgagee. *Fox v. Phoenix F. Ins. Co.*, 52 Me. 333; so an owner's insurance is not avoided by subsequent insurance obtained by a sheriff who has seized the insured property at the suit of a creditor. *Morigny v. Home Mut. Ins. Co.*, 13 La. Ann. 338; so a policy to the mortgagee is not avoided by subsequent insurance by mortgagor. *Norwich F. Ins. Co. v. Boomer*, 52 Ill. 442; but it matters not in whose name it is effected if it be for the

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benefit of the first insured and he know of and consent to it, it is other insurance. *Holbrook v. American Ins. Co.*, 1 Curtis' C. C. 193. So a policy to a mortgagor assigned to mortgagee is other insurance and will avoid a prior policy to the same mortgagee which prohibited other insurance. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495.

The owner of a stock of goods sold them and the vendee procured insurance and assigned the policy with insurer's consent to the vendor. The vendee obtained other insurance for his own account. Held, that the second was void. *Neve v. Columbia Ins. Co.*, 2 McMul. 220; *Leavitt v. Western F. Ins. Co.*, 7 Rob. (La.) 351.

In *Shurtliff v. Phenix Ins. Co.*, *supra*, it was doubted whether an agent of the company can waive a condition against other insurance. It was held that he can in *Hayward v. Nat. Ins. Co.*, 14 Am. Rep. 400; *Geib v. International Ins. Co.*, 1 Dill. C. C. 443; *Whitwell v. Putnam F. I. Co.*, 6 Lans. 166; *Pechner v. Phenix Ins. Co.*, id. 411; *MoEwen v. Montgomery Co. Mut. Ins. Co.*, 5 Hill, 101; *Sexton v. Montgomery Mut. Ins. Co.*, 9 Barb. 191; *Carroll v. Charter Oak Ins. Co.*, 1 Abb. Dec. 316; *Hadley v. N. H. F. Ins. Co.*, 55 N. H. 110; *Schenck v. Mercer County Mut. F. Ins. Co.*, 24 N. J. 447; *National Ins. Co. v. Crane*, 16 Md. 260; *Kenton Ins. Co. v. Shea*, 6 Bush, 174; *Van Bories v. United Life Ins. Co.*, 8 Id. 133; *New England Ins. Co. v. Schettler*, 38 Ill. 166; *Cobb v. Ins. Co.*, 11 Kan. 93; *Carrugi v. Atlantic F. Ins. Co.*, 40 Ga. 135; *Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253.

Where one man is agent of both companies notice will be implied. *Kenton Ins. Co. v. Shea*, 6 Bush, 174; *Insurance Co. of N. A. v. McDowell*, 50 Ill. 120; *Russell v. State Ins. Co.*, 55 Mo. 585.

In *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143, the policy provided that nothing less than a distinct specific agreement, clearly expressed and indorsed upon the policy, should be construed to be a waiver of any condition in it. Yet the court held that where an agent with whom all the dealings were had and whose authority was not shown to have been restricted in any way, has so acted as to have bound himself by way of estoppel not to dispute the validity of additional insurance on the point of consent, the company will be likewise bound.

But notice to an insurance broker who procures policies for a large number of companies is not notice to the company. *Mallen v. Hamilton F. Ins. Co.*, 17 N. Y. 606. There is a dictum in *Gilbert v. The Phenix Ins. Co.*, 36 Barb. 372, that verbal notice of other insurance to an agent with authority to receive applications and issue policies would not affect the question of breach "by reason of not having such insurance mentioned in or indorsed upon the policy or otherwise acknowledged in writing."

Where a company's by-laws required consent of the directors, signified in the policy or by indorsement, signed by the secretary, to subsequent insurance, it was held that consent of one director indorsed upon the application was not sufficient. *Forbes v. Agawam Mut. Fire Ins. Co.*, 9 Cush. 470; so in *Hale v. Mechanics' Mut. Ins. Co.*, 6 Gray, 169, where the policy prohibited other insurance unless the assent of the president should be obtained in writing, it was held that a waiver could not be proved, and that the president's parol consent was not good. When the company's charter made policies void for other insurance unless indorsed upon them, held that the condition could not be waived nor consent proved by other evidence than indorsement. *Couch v. City F. Ins. Co.*, 38 Conn. 181; S. C., 9 Am. Rep. 375. So, where the charter and by-laws provided "The president and secretary may give leave to make other insurance," it was held that consent given by a director or the secretary was not valid. *Stark County Mut. Ins. Co. v. Hurd*, 19 Ohio, 149.

In *Security Ins. Co. v. Fay*, 22 Mich. 467; S. C., 7 Am. Rep. 670, the policy was conditioned to be void "if without written consent herein, there is any other prior or subsequent insurance." Nothing was said as to who should sign the consent, but the policy was required to be countersigned by the general agent of the company. Afterward other insurance was obtained without the first insurer's consent, but subsequently as

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agent indorsed on the policy permission for other insurance, though the indorsement was not signed. The court held that the unsigned indorsement was invalid in the absence of the signature of the general agent, without proof that it was made by some one authorized to bind the company or had been ratified by it; that no act of the company or its agent could operate as a waiver of written consent and render valid a void policy unless performed with full knowledge of all the facts.

In *Mentz v. Lancaster F. Ins. Co.*, 79 Penn. St. (29 P. F. Smith) 475, the plaintiff insured in defendants' company, one condition being that if additional insurance were effected, it should be indorsed on the policy; the plaintiff effected additional insurance in another company with their agents, who were also agents of the defendants; on inquiry by plaintiff, who gave his policy to the agent, he said that the indorsement of the second insurance had been made on the first policy; the indorsement had not in fact been made. In an action against the defendants for a loss, held, that the declarations of their agent estopped them from objecting to the want of indorsement, and the plaintiff could recover.

It is to be observed that in several of the cases holding that notice to the agent or a waiver by the agent was of no effect, the companies were mutual companies whose members were bound by the by-laws and which provided that the agents and officers should not deviate from the conditions.

It is sufficient that the company is informed of the true amount although there is a mistake as to the company. *Benjamin v. Saratoga Mut. F. Ins. Co.*, 17 N. Y. 415; *Osser v. Provincial Ins. Co.*, 12 U. C., C. P. 141. So, where notice of other insurance is given, notice of renewal is not necessary. *Brown v. Cattaraugus Mut. Ins. Co.*, 18 N. Y. 385; nor where privilege for a stipulated amount of other insurance is given is notice of the names and amounts of the other risks necessary. *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389; *Liscom v. Boston Mut. Ins. Co.*, 9 Metc. 205. The insured is not bound to state the particulars of the amount of other insurance unless specially required to do so. *McMahon v. Portsmouth Mut. F. Ins. Co.*, 22 N. H. 15.

Written notice is not necessary. *Schenck v. Mercer County M. F. Ins. Co.*, 24 N. J. 447.

Notice to the secretary of the company estops that company from alleging no notice where the same person is also secretary of the other company and the same persons were directors of both companies and examined the application. *Goodall v. New England Mut.*, 25 N. H. 169.

Where other insurance is obtained for an amount in excess of that for which consent was given the policy is void. *Shurtliff v. Phenix Ins. Co.*, 57 Me. 137.

Where a policy stipulated that "insured shall give notice of all additional insurance and of all changes that may be made in such additional insurance," notice must be given of a renewal of other insurance and of any change in the distribution or division of it. *Simson v. Pennsylvania Fire Ins. Co.*, 38 Penn. St. 250.—*REP.*

Simpson v. Davis.

SIMPSON V. DAVIS.

(119 Mass. 269.)

Negotiable instrument — alteration of — burden of proof.

In an action upon a promissory note, in which the declaration alleges that the defendant made the note, and the answer denies this and alleges an alteration, proof of the defendant's signature is *prima facie* evidence that the whole body of the note written over it is the act of the defendant, but the burden of proof is on the plaintiff to show that the note declared on was the note of the defendant.

CONTRACT upon a promissory note, of which the following is a copy : “\$400. Fall River, Dec. 29th, 1873. For value received, I promise to pay Abel R. Davis or order four hundred dollars, with interest, six months after date. John Davis.” Indorsed, “Abel R. Davis.” The answer contained a general denial, and alleged that “there has been a material alteration in said note since it was given, if it shall appear it was given by the defendant.”

At the trial in the Superior Court, before PITMAN, J., without a jury, the signature of the defendant was admitted, and there was evidence tending to prove the genuineness of the indorsement. The plaintiffs thereupon rested.

The defendant then offered evidence tending to show that the words “six months after date” were not in the note when signed and delivered by him, but had been added since, without his knowledge or assent. Testimony to the same point was also introduced by the plaintiffs in rebuttal. The plaintiffs contended that the burden of proof was on the defendant to establish and prove said alteration, but the judge ruled “that the proof of the signature of a party to a note is *prima facie* evidence that the whole body of the note written over it is the act of said party ; but that such proof is merely *prima facie*, that when, as in the present case, proper pleadings present the issue, the plaintiffs are bound to prove affirmatively that the note declared on and put in proof is substantially the note made by the defendant ; and that, when proof has been offered by the defendant tending to show a material alteration, the burden of proof is with the plaintiffs, to satisfy the court, or jury, upon the whole case, that the note so declared on was in substance and effect the note of the defendant.”

The judge found for the defendant ; and the plaintiffs alleged exceptions.

Commonwealth v. O'Brien.

N. Hatheway & H. K. Bruley, for plaintiffs.

J. M. Morton, Jr., & J. M. Wood, for defendant.

ENDICOTT, J. The plaintiffs allege in the declaration that the defendant made the note declared on. This the defendant denies, and says that there has been an alteration of the note since it was given. If an alteration was made after its execution and without the defendant's consent, the note declared on is not the note of the defendant. The plaintiffs must establish that it is this defendant's note, and on this proposition the plaintiffs have the burden of proof throughout. The plaintiffs rely upon the words of SHAW, C. J., in *Davis v. Jenney*, 1 Metc. 221, 224: "that an extension of the time was a material alteration, and that the burden of proof was upon the defendant to show the alteration." That the words are not here used in their technical sense, is evident from the paragraph that follows: "or perhaps to state this last proposition with a little more precision, the proof or admission of the signature of a party to an instrument is *prima facie* evidence that the instrument written over it is the act of the party; and this *prima facie* evidence will stand as binding proof, unless the defendant can rebut it by showing, from the appearance of the instrument itself, or otherwise, that it has been altered." In *Wilde v. Armsby*, 6 Cush. 314, it was held that the burden of proof was on the plaintiff to show that an interlineation was made before the instrument was executed. The same rule applies as when a want of consideration is relied on as the defense to a promissory note; the burden of proof is on the plaintiff, upon the whole evidence, to establish that fact. *Delano v. Bartlett*, 6 Cush. 364; *Morris v. Bowman*, 12 Gray, 467; *Powers v. Russell*, 13 Pick. 69, 76. The ruling at the trial was correct.

Exceptions overruled.

COMMONWEALTH v. O'BRIEN.

(119 Mass. 342.)

Evidence — of reputation on criminal trial.

Upon the trial of an indictment the defendant introduced evidence tending to show that his general reputation was good. Held, that the prosecution could not in reply put in evidence of particular facts. (See note, p. 328.)

INDICTMENT for an assault with a dangerous weapon, with intent to kill. The facts are sufficiently stated in the opinion.

The jury returned a verdict of "guilty of assault and battery with a knife, but without intent to kill and murder, as alleged." The defendant alleged exceptions.

G. W. Searle, for defendant.

W. C. Loring (*C. R. Train*, Attorney-General, with him), for the Commonwealth.

ENDICOTT, J. The defendant called witnesses who testified to his general reputation as a peaceable and quiet citizen. The government was then allowed to prove that the defendant had been indicted for an assault, and to put in evidence an indictment, wherein he was, with other persons, indicted for an assault upon one John Walsh. To this indictment it appeared that the defendants pleaded not guilty; two days afterward satisfaction was filed, and on the day following the plea was retracted by the defendants, and they pleaded guilty. The indictment was then placed on file on payment of costs, which were paid, but no sentence was passed. The evidence thus admitted to meet evidence of general reputation was, in substance, that the prisoner had committed another assault, and had in court admitted or confessed the same by a plea of guilty. And the question is, can a particular fact be proved to rebut evidence of a general reputation?

Where a party undertakes to show that his reputation is good, or that the reputation of the other party or a witness is bad, he cannot put in evidence of particular facts to prove the general reputation he is endeavoring to establish. And to meet evidence of general reputation the opposing party may put in evidence to the contrary of a like general character. But he cannot prove particular facts for the reason that a particular fact does not necessarily establish a general reputation or fairly meet the issue presented, and may also raise collateral issues; and for the further reason that while a party is presumed always to be ready to defend his general reputation, he is not expected to be prepared to meet a distinct and specific charge. *Peterson v. Morgan*, 116 Mass. 350.

In *Commonwealth v. Hardy*, 2 Mass. 303, 318, it was said by Chief Justice PARSONS: "It is not competent for the prosecutor to go into this inquiry, until the defendant has voluntarily put his character in issue, and in such case there can be no examination as to particular facts."

See *Commonwealth v. Sacket*, 22 Pick. 394; *Commonwealth v. Webster*, 5 Cush. 295.

In a case heard before all the judges of England, it was held that, if evidence of good character is given in behalf of the prisoner, evidence of bad character may be given in reply; but in either case the evidence must be confined to the prisoner's general reputation, and the individual opinion of the witness as to his disposition, founded on his own experience and observation, is inadmissible. Chief Justice COCKBURN, in delivering the opinion of the court, says: "The only way of getting at it [his character] is by giving evidence of his general character founded on his general reputation in the neighborhood in which he lives." "It is quite clear that, as the law now stands, the prisoner cannot give evidence of particular facts, although one fact would weigh more than the opinion of all his friends and neighbors. So, too, evidence of antecedent bad conduct would form equally good ground for inferring the prisoner's guilt, yet it is quite clear evidence of that kind is inadmissible." Again, in speaking of the limits of rebutting evidence, where the prisoner puts in evidence of good character, he says: "I think that that evidence must be of the same character and confined within the same limits, — that as the prisoner can only give evidence of general good character, so the evidence called to rebut it must be evidence of the same general description, showing that the evidence which has been given in favor of the prisoner is not true, but that the man's general reputation is bad." The judges who dissented admitted that evidence of particular facts was inadmissible, but were of opinion that the testimony of a witness founded on his own experience and observation went to show disposition and was therefore admissible on the question of character. Chief Justice ERLE said: "I agree that evidence of individual facts is to be excluded; but whether the answer given by the witness in this case is in the nature of an individual fact or not I do not stop to inquire, because a question of very general importance has been raised; and, with reference to that question, I am of opinion that the answer, understood as evidence of disposition, is admissible." *Regina v. Rowton*, Leigh & Cave's C. C. 520; S. C., 10 Cox's C. C. 25; and 2 Lead. Crim. Cas. (2d ed.) 333, 351, and notes.

It is true that upon cross-examination of a witness, testifying to general reputation, questions may be put to show the sources of his information, and particular facts may be called to the witness's attention, and he may be asked if he ever heard of them; but this is allowed, not for the purpose of establishing the truth of these facts, but to test the credibility of the witness, and to ascertain what weight or value is to be

given to his testimony. *Leonard v. Allen*, 11 Cush. 241; *Rex v. Martin*, 6 C. & P. 562. So in actions for slander, evidence of general bad character of the plaintiff may be put in evidence in mitigation of damages; and where the plaintiff alleges that the defendant has slandered him in a particular respect, as for thieving, the defendant may put in evidence for the same purpose that the plaintiff's general reputation in that respect is also bad. *Clark v. Brown*, 116 Mass. 504. But we are not aware of any case, where the defendant upon that issue has been allowed to prove a particular act of theft.

We are of opinion therefore that the learned judge erred in admitting this evidence. The government was entitled to rebut the evidence of the defendant, he having put his character in issue, but could not do so by proof of another assault.

Exceptions sustained.

NOTE.—See Roscoe's *Crim. Ev.* (7th Am. Ed.) 100, and Sharswood's notes; Wharton *Hom.*, § 594; Whart. *Crim. Law*, § 637; Best on *Ev.*, § 261; Greenl. *Ev.* (13th Ed.), § 25.

In *McCarty v. People*, 51 Ill. 231, a party on trial upon a charge of murder, introduced evidence of his good character by general reputation, which was sought to be rebutted by evidence of particular acts of misconduct or crime, and that by rumors and reports in the country: *Held*, that such proof in rebuttal was inadmissible; every man is presumed ready at all times to defend his general character, but not his individual acts.

Where in defense to rape testimony to the general good character of the accused was introduced, the State was allowed to ask on cross-examination whether a certain lewd woman had not lived for some time in his family. *State v. Jerome*, 33 Conn. 265.—*Rxp.*

COMMONWEALTH V. COLLBERG.

(119 Mass. 350.)

Assault and battery — prize fighting — consent

Where two persons, by mutual agreement, engage in a fight with each other, each is guilty of an assault and battery, although there is no anger or ill-will. (*See note, p. 328.*)

INDICTMENT for assault and battery. Both indictments were founded upon and supported by the same evidence. The defendant in each indictment was indicted for an assault and battery upon the other, and the evidence showed that the act complained of was a fight between the parties entered upon by mutual agreement and consent for the purpose of testing which was the "best man."

Commonwealth v. Collberg.

At the trial the defendants asked the judge to instruct the jury as follows :

" If the jury are satisfied that whatever acts and things the defendants did to each other they did by mutual consent, and that the struggle between them was an amicable contest voluntarily continued on both sides without anger or malice, and simply for the purpose of testing their relative agility and strength, then there is no assault and battery, and the defendants must be acquitted."

The judge declined to give this instruction, but instructed the jury upon this branch of the case in substance as follows : " That if the defendants were simply engaged in a wrestling match, that being a lawful sport, they could not be convicted of an assault and battery ; but if by mutual agreement between themselves, previously made, they went to a retired spot for the purpose of fighting with each other, and for the purpose of doing each other physical injury by fighting, with a view to ascertain by a trial of their skill in fighting which was the best man, and there engaged in a fight, each endeavoring to and actually doing all the physical injury in his power to the other, and if, in such contest, each did strike the other with his fist for the purpose of injuring him, each may properly be convicted of assault and battery upon the other, although the whole was done by mutual arrangement, agreement and consent, and without anger on the part of either against the other."

To this instruction, and to the refusal of the judge to give the instruction prayed for, the defendants alleged exceptions.

G. S. Scammon, for defendants.

W. C. Loring (*C. R. Train*, Attorney-General, with him), for the Commonwealth.

ENDICOTT, J. It appears by the bill of exceptions that the parties by mutual agreement went out to fight one another in a retired place, and did fight in the presence of from fifty to one hundred persons. Both were bruised in the encounter, and the fight continued until one said that he was satisfied. There was also evidence that the parties went out to engage in and did engage in a " run and catch " wrestling match. We are of opinion that the instructions given by the presiding judge contained a full and accurate statement of the law.

The common law recognizes as not necessarily unlawful certain manly sports calculated to give bodily strength, skill and activity, and " to fit people for defense, public as well as personal, in time of need." Playing at cudgels or foils, or wrestling by consent, there being no

motive to do bodily harm on either side, are said to be exercises of this description. *Fost. C. L.* 259, 260; *Com. Dig. Plead.* 3 m. 18. But prize-fighting, boxing matches, and encounters of that kind, serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement and without anger or mutual ill will *Fost. C. L.* 260; 2 *Greenl. on Ev.*, § 85; 1 *Stephens' N. P.* 211.

If one party license another to beat him, such license is void, because it is against the law. *Matthew v. Ollerton*, *Comb.* 218. In an action for assault, the defendant attempted to put in evidence that the plaintiff and he had boxed by consent, but it was held no bar to the action, for boxing was unlawful, and the consent of the parties to fight could not excuse the injury. *Boulter v. Clark*, *Bull. N. P.* 16. The same rule was laid down in *Stout v. Wren*, 1 *Hawks (N. C.)*, 420, and in *Bell v. Hansley*, 3 *Jones (N. C.)*, 131. In *Adams v. Waggoner*, 33 *Ind.* 531, the authorities are reviewed, and it was held that it was no bar to an action for assault that the parties fought with each other by mutual consent, but that such consent may be shown in mitigation of damages. See *Logan v. Austin*, 1 *Stew. (Ala.)* 476. It was said by COLERIDGE, J., in *Regina v. Lewis*, 1 *C. & K.* 419, that "no one is justified in striking another except it be in self-defense, and it ought to be known, that whenever two persons go out to strike each other, and do so, each is guilty of an assault;" and that it was immaterial who strikes the first blow. See *Rex v. Perkins*, 4 *C. & P.* 537.

Two cases only have been called to our attention, where a different rule has been declared. In *Champer v. State*, 14 *Ohio St.* 437, it was held that an indictment against A. for an assault and battery on B. was not sustained by evidence that A. assaulted and beat B. in a fight at fisticuffs, by agreement between them. This is the substance of the report, and the facts are not disclosed. No reasons are given or cases cited in support of the proposition, and we cannot but regard it as opposed to the weight of authority. In *State v. Beck*, 1 *Hill (S. C.)*, 363, the opinion contains statements of law in which we cannot concur.

Exceptions overruled.

NOTE.—See to same effect *Adams v. Waggoner* (33 *Ind.* 53), 5 *Am. Rep.* 231, which was an action for assault and battery. In *State v. Beck*, mentioned in the opinion, the party assaulted was whipped at his own request to save him (as was supposed) from punishment for felony.—RKP.

Pillow v. Bushnell, 5 *Barb.* 156, was an action by a husband and wife to recover damages for an alleged injury to the person of the wife, and it was held that the defendant could prove that the act complained of was done by the consent and request of the wife, and that such fact, if proved, would constitute an entire defense.—RKP.

Ladd v. New Bedford Railroad Company.

LADD V. NEW BEDFORD RAILROAD COMPANY.

(119 Mass. 412.)

Negligence — liability of railroad for defects in cars. Master and servant — injury to servant.

In an action by the servant of a railroad company against the company for an injury sustained by means of a car's being thrown from the track by the breaking of a switch, the declaration alleged that the injury was caused by the defendant's negligence, 1st, in not having a proper switch at the place, and 2d, in the imperfection of its cars by the want of proper check-chains. *Held*, (1) that the company was not responsible for hidden defects not discoverable by the most careful inspection; and (2), it appearing that plaintiff knew that some of defendant's cars had no check-chains and were therefore not safe, that he assumed the risk incident thereto, although he had not prior to the accident noticed the absence of them from the particular car. (*See note, p. 333.*)

TORT by a road master, in the employ of the defendant corporation to recover for an injury sustained by him in consequence of the defendant's cars, in one of which he was riding, being thrown down a bank by the breaking of a switch on the defendant road.

At the trial in the Superior Court, WILKINSON, J., ruled that the evidence would not warrant a verdict for the plaintiff, and directed a verdict for the defendant; and the plaintiff alleged exceptions, the substance of which appears in the opinion.

E. H. Bennet & W. H. Fox, for plaintiff.

G. A. Torrey, for defendant.

GRAY, C. J. The original declaration alleged that the accident was caused by the defendant's negligent employment of an incompetent switchman and an incompetent engineer, and by the incompetency and negligence of the switchman and the engineer. But there was no evidence at the trial that the corporation negligently employed incompetent servants; and it was admitted at the argument that the switchman and the engineer were fellow-servants of the plaintiff, for whose negligence the corporation was not liable to him. *Gilman v. Eastern Railroad*, 10 Allen, 288.

The plaintiff now relies upon the amended declaration, which alleges that the injury was caused by the negligence of the corporation: 1st, in not having a proper switch at this place; 2d, in the imperfection of its cars by the want of proper check-chains.

1. The corporation was doubtless obliged to use the utmost care con-

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sistent with the nature and extent of its business, in providing a proper switch ; but it was not responsible for hidden defects, which could not have been discovered by the most careful inspection. *Ingalls v. Bills*, 9 Metc. 1 ; *King v. Boston & Worcester Railroad*, 9 Cush. 112 ; *Simmons v. New Bedford, Vineyard & Nantucket Steamboat Co.*, 97 Mass. 361 ; *Ford v. Fitchburg Railroad*, 110 id. 240 ; S. C., 14 Am. Rep. 598 ; *Readhead v. Midland Railway*, L. R., 2 Q. B. 412, and L. R., 4 Q. B. 379.

There was no evidence at the trial that there was any negligence in procuring a proper switch ; or any defect in the switch which could have been discovered upon the most careful inspection ; or that any accident would have happened by reason of the condition of the switch, if there had been no negligence on the part of the engineer in passing over it at an unreasonable rate of speed ; or that the switch was intended, or could reasonably have been expected, to hold cars upon the track which were driven at unreasonable speed.

There was therefore no evidence which would have warranted the jury in finding that the defendant was liable by reason of a defect in the switch. *Duffy v. Upton*, 113 Mass. 544.

2. Upon the question whether check-chains were a usual and proper precaution to be taken by the defendant, the evidence was conflicting. But the plaintiff's own testimony showed that for a long time he had been in the employ of the defendant corporation, and had been of opinion that to run trains of cars without check-chains was not safe for passengers ; that he knew that some of the defendant's cars were not provided with check-chains ; and that he did not notice, when he took this car, nor until after the accident, whether it had check-chains or not.

Every corporation has the right to carry on a business which is dangerous, either in itself or in the manner of conducting it, if it is not unlawful, and interferes with no rights of others ; and is not liable to one of its servants, who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom. *Priestley v. Fowler*, 3 M. & W. 1 ; *Skipp v. Eastern Counties Railway*, 9 Exch. 223 ; *Seymour v. Maddox*, 16 Q. B. 326 ; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 585 ; *Sullivan v. India Manuf. Co.*, 113 id. 396 ; *Dillon v. Union Pacific Railroad*, 3 Dillon, 319.

This is not like a case in which the premises or instruments, upon or by means of which the business is carried on, are temporarily defective, in which case the master may be liable, especially if he has promised the

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servant to repair them, and has failed to do so. *Snow v. Housatonic Railroad*, 8 Allen, 441; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Clarke v. Holmes*, 6 H. & N. 349, and 7 id. 937; *Holmes v. Worthington*, 2 F. & F. 533; *Patterson v. Pittsburg & Connellsville Railroad*, 76 Penn. St. 389

As to the case of *Britten v. Great Western Cotton Co.*, L. R., 7 Ex. 130, cited for the plaintiff, it may be observed: 1st. The defendant in that case was under absolute obligation by statute to do what it had failed to do. 2d. The jury found that the plaintiff did not know of the risk which he assumed. 3d. The decision can hardly be reconciled with several previously made by the same court. *Dynen v. Leach*, 26 L. J. (N. S.) Ex. 221; *Assop v. Yates*, 2 H. & N. 768; *Griffiths v. Gidlow*, 3 id. 648.

In the case at bar, any risk arising from the want of check-chains was one incident to the plaintiff's employment, and knowingly assumed by him, and for which, therefore, he can maintain no action against the corporation.

Exceptions overruled.

NOTE.—As to the degree of care required of a carrier of passengers, see *Taylor v. Grand Trunk Ry. Co.*, 48 N. H. 304; S. C., 2 Am. Rep. 229, and note, 242; *Meirs v. Pennsylvania R. R. Co.*, 64 Penn. St. 225; S. C., 3 Am. Rep. 581; *McPadden v. New York Cent. R. R. Co.*, 44 N. Y. 478; 4 Am. Rep. 705.

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(119 Mass. 426.)

Bankruptcy — judgment in attachment suit.

Plaintiff attached defendant's property in an action upon a debt provable in bankruptcy. More than four months thereafter defendant was adjudged a bankrupt. Held, that in case there had been no unreasonable delay in obtaining the discharge, plaintiff was not entitled to a judgment enforceable against the property, until the question of the defendant's discharge was determined.

ACTION of contract against the acceptors of a draft and trustees commenced in January, 1874. The trustees admitted funds of the defendants in their hands, and they were in December following charged as trustees.

The defendants answered that, in November, 1875, they had been adjudged bankrupts, and that sufficient time had not elapsed for them to obtain their discharge, and prayed that the suit should be stayed until the question of their discharge was adjudicated.

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At the trial it appeared that the defendants had been adjudicated bankrupts, as alleged in their answer; and it was admitted that sufficient time had not elapsed in the proceedings in bankruptcy for them to obtain their discharge, and that there had been no unreasonable delay on their part in endeavoring to obtain it. It was also admitted that the plaintiffs' debt was under the bankrupt act provable in the proceedings in bankruptcy. The defendants contended that this suit should be stayed to await the determination of the court of bankruptcy on the question of their discharge, as provided in the bankrupt act, and filed a motion to that effect; but the judge refused to stay the same, and ordered judgment for the plaintiffs for the whole amount of the acceptance, "such judgment only to be enforced against the property attached on the writ in the hands of the trustees, but not to be enforced against the persons of the defendants, or either of them, or any other property." The defendants alleged exceptions.

C. T. Russell, for defendants.

R. Stone, Jr., for plaintiffs.

GRAY, C. J. A creditor who has brought his action more than four months before the commencement of the proceedings in bankruptcy, and has made an attachment which is not dissolved by such proceedings, may doubtless, after the question of the bankrupt's discharge has been determined by the United States court, have a special judgment against the property attached, even if a certificate of discharge has been granted to the bankrupt. *Davenport v. Tilton*, 10 Metc. 320; *Bates v. Tappan*, 99 Mass. 376; *Stockwell v. Silloway*, 113 id. 382; *Johnson v. Collins*, 116 id. 392; *Peck v. Jenness*, 7 How. 612; *Doe v. Childress*, 21 Wall. 642, 646.

But the bankrupt act expressly provides that "no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge," unless in case of unreasonable delay on the part of the bankrupt in endeavoring to obtain his certificate, or of proceeding, for the purpose of ascertaining the amount due, to a merely formal judgment, upon which no execution can issue. U. S. Stat. 1867 ch. 176, § 21; U. S. Rev. Stats., § 5106.

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The object of this provision is not only to protect the bankrupt, in case he obtains his certificate, from having the original cause of action against him merged in a judgment, the right of action upon which would not be barred by the discharge (*Bradford v. Rice*, 102 Mass. 472); but to prevent his being harassed by suits until the question of discharge is determined, and therefore extends to all cases, without regard to the question whether the debt would or would not be barred thereby (*In re Rosenberg*, 3 Bened. 14; *In re Ghirardelli*, 1 Sawyer, 343); and also to enable the assignee, to whom all the rights of the bankrupt in the property have passed, subject to the attachment, to come in, if he elects so to do, and assume the defense of the action. U. S. Stat. 1867, ch. 176, § 14; U. S. Rev. Stats., § 5047; *Doe v. Childress*, 21 Wall. 642; *Cleveland v. Boerum*, 24 N. Y. 618.

If, indeed, neither the bankrupt nor the assignee moves for a stay of proceedings, the court may proceed to judgment. *Dunbar v. Baker*, 104 Mass. 211; *Cutter v. Evans*, 115 id. 27; *Doe v. Childress*, *ubi supra*. But the court should allow reasonable time for the assignee to come in if he sees fit; and, if either the bankrupt or the assignee seasonably interposes the objection, the proceedings must be stayed.

In *Bosworth v. Pomeroy*, 112 Mass. 293, the assignee had been admitted to defend the action, and it was agreed by all the parties that the case stood as if the bankrupt had received his discharge.

In the present case, it having been duly alleged by the bankrupts, and proved to the satisfaction of the court, that sufficient time had not elapsed for them to obtain their discharge, and that there had been no unreasonable delay on their part in endeavoring to obtain it, the action of the Superior Court, refusing a stay of proceedings and ordering judgment, was erroneous.

Exceptions sustained.

PETERSILEA V. STONE.

(119 Mass. 483.)

Officer de facto — who is — acts of.

Service of a legal notice was made by a person whose term of office as a constable had expired, but who was generally supposed to be a constable, and at the time was notoriously acting as such. *Held*, that he was an officer *de facto*, and that the validity of the service could not be collaterally called in question.

ACTION of contract upon a poor debtor's recognizance executed by one Shedd as principal and by the defendant as surety. The case was submitted, on an agreed statement of facts which were in substance that all the proceedings under the law for the relief of poor debtors were valid, except the service upon plaintiff of the notice that Shedd desired to take the poor debtor's oath. Such notice was served by one Farr, who described himself as a constable, but who, it was claimed, was not. The sufficiency of such notice was the only question at issue.

Farr was duly appointed and qualified as a constable "for one year, from September 29, 1873, and until another be appointed in his place." On the 28th of September, 1874, Farr was nominated again for constable by the mayor, but failed of confirmation until November 9, following. The notice in question was served October 5, 1874.

Farr had been for several consecutive years a constable of said city, duly qualified to serve, and serving, civil process, and was generally known as such, and on that day, before, at the time of, and after the service, he held himself out and was notoriously acting as such constable, as he had done since September 29, 1873, having an office in Boston, and on the door thereof his name with the addition of "constable." Shedd delivered the notice to Farr for service at his office, and then and until long after such service believed that Farr was duly qualified as such constable to serve the notice. Farr arrested Shedd on the execution, in pursuance whereof the recognizance was taken, and at the time of receiving and serving said notice held said execution as such officer.

Farr knew that he had failed of confirmation as constable on September 28; but it was agreed that he and Shedd both acted in good faith, both believing that Farr was duly authorized to serve said notice.

If the service of said process was sufficient, judgment was to be entered for the defendant; otherwise, for the plaintiff. Judgment was entered for the defendant in the Superior Court.

H. F. Buswell, for plaintiff.

C. Robinson, Jr., for defendant.

DEVENS, J. If Farr was an officer *de facto*, the validity of the service by him of the notice to take the poor debtor's oath cannot be inquired into collaterally. *Coolidge v. Brigham*, 1 Allen, 333. In order to show that he was not, the plaintiff relies upon the statement of BIGELOW, C. J., in *Fitchburg Railroad v. Grand Junction Railroad*, 1 Allen, 552, 557, that "the exact distinction between an usurper or intruder, and an

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officer *de facto*, is this: the former has no color of title to the office; the latter has, by virtue of some appointment or election." If this were intended as a general definition of an officer *de facto*, it would be incomplete, but the inquiry there presented to the court was as to the validity of certain acts done by one who acted under a commission *prima facie* valid, and issued by an authority apparently empowered to invest him with the legal rights and powers of the office to which he was appointed, and it is to be limited to the case then before the court. The reason of public policy, upon which it is held that the acts of an officer *de facto* are not to be called in question collaterally, but are valid as to third persons, may apply even to the case where such officer is a usurper and intruder. This principle has been applied in England to the most important office; after Edward IV obtained the crown, the kings of the line of Lancaster, who had preceded him, were spoken of as "*nuper de facto et non de jure reges Angliæ*," but although Henry VI had been declared a usurper by act of Parliament, attempts against his authority (not having been in aid of the rightful king) were capitally punished. 1 Bl. Comm. 204; 4 id. 77. Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority; if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question. *Brown v. Lunt*, 37 Me. 423; *State v. Carroll*, 38 Conn. 449; S. C., 9 Am. Rep. 409. If the party thus recognizing the officer *de facto* were aware that such officer had some appointment or election, it would strengthen his belief, but without this he would be justified in believing that an authority publicly exercised and assented to was rightfully assumed. *Wilcox v. Smith*, 5 Wend. 231. The definition of an officer *de facto*, as given by Lord ELLENBOROUGH, in *The King v. Bedford Level*, 6 East, 356, which he generalizes from that of Lord HOLT, in *Parker v. Kett*, 1 Ld. Raym. 658, 660, is "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law," and the above suggestions are in accordance with this definition. In the opinion in *People v. Collins*, 7 Johns. 549, relied on by the plaintiff, it is held that the commissioners, whose acts were there in question, were officers *de facto*, as they came into their office by color of title; and it is added that "it is a well-settled principle of law that the acts of such persons are valid when they concern the public, or the rights of third persons who have an interest in the act done."

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The principle, upon which the acts of officers *de facto* have been held valid, has sometimes been extended, so far as to protect them, under certain circumstances, when they have been directly proceeded against. The question then presented is not the same as that where the rights of third persons only are involved, and in such cases it would not be sufficient that they had publicly exercised such office, but they might properly be called upon to show they did so by virtue of some appointment or election, which they had a right to believe valid, even if it were otherwise. *State v. Carroll, ubi supra.*

It was shown in the present case that Farr was "notoriously acting" as constable, having an office in Boston, and upon its door his name with the addition of the word "constable;" and as to third persons he must be deemed an officer *de facto*.

Were it necessary in order to maintain his proceeding to show that he had color of title by some appointment or election, it would not perhaps be difficult to do so. Farr had originally a proper appointment, and even if he, who wrongfully holds over after the term for which he is appointed has expired, and this is known to him, cannot be said to hold by color of title, there are many cases where this expiration cannot be clearly ascertained. He who thus continues to hold his office erroneously but under a claim of right, honestly and reasonably made, has color of title from his original appointment or election. *Crew v. Vernon, Cro. Car. 97.* These considerations have rendered it unnecessary to determine whether Farr was an officer *de jure*.

Judgment affirmed.

 BOSTON AND MAINE RAILROAD V. PORTLAND, SAGO AND PORTSMOUTH RAILROAD COMPANY.

(119 Mass. 498.)

Action — parties — joint liability when severed.

Where a person, answerable in contract to two jointly, settles with one of them so that that one has no longer any real interest in the matter in dispute, it is a severance of the cause of action, and the debtor is liable in an action at law to the other alone.

ACTION of contract for the recovery of money.

In 1847 the plaintiff and the Eastern Railroad Company made a joint

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contract whereby the former were to have possession of defendant's railroad and other property, and to operate the same, paying the defendant a fixed dividend on its capital stock therefor. They further agreed to make all necessary betterments and additions to equipments for which defendant agreed to pay them at the termination of the contract. At such termination in 1871 plaintiff contended that there was due to plaintiff and the Eastern Railroad Company about one million dollars for such betterments and brought this action to recover one-half thereof.

In May, 1871, the Eastern Railroad Company made a new agreement with the defendant for the exclusive possession and running of the defendant's road, which agreement contained the following clause: "In furtherance of the objects and purposes of the parties hereto, the said Eastern Railroad Company agrees with the said Portland, Saco and Portsmouth Railroad Company that the said Eastern Railroad Company will forthwith assume and will pay, release or discharge all the debts, liabilities and obligations of every description of the said Portland, Saco and Portsmouth Railroad Company, by reason of any matter or thing heretofore done, suffered or transacted by said Portland, Saco and Portsmouth Railroad Company, or which it may hereafter become liable and bound to pay or do, by reason of any acts or omissions of the said Eastern Railroad Company as the agent of the said Portland, Saco and Portsmouth Railroad Company, under this contract, and will at all times save and keep the said Portland, Saco and Portsmouth Railroad Company harmless and indemnified from and against all claims, penalties and forfeitures, suits and demands, for or by reason of any of the said debts, obligations or liabilities, and all debts, obligations, liabilities, penalties and forfeitures arising from any of the acts or omissions of the said Eastern Railroad Company, as agents as aforesaid or otherwise, so that the said Portland, Saco and Portsmouth Railroad Company shall not suffer any loss or injury thereby, and will obey all orders, judgments and decrees of any and all courts having jurisdiction in the premises, and save and keep the said Portland, Saco and Portsmouth Railroad Company, its property and franchise, from loss or injury thereby and fully protected therefrom.

Before bringing the action, the plaintiff requested the Eastern Railroad Company to join therein as a party plaintiff, and it refused to do so.

The judge reserved the question, for the consideration of the full court, whether the plaintiff could alone maintain the action for its share of the amount due under the contract. If the action could be maintained, it was to stand for trial, after having been sent to an auditor; otherwise,

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judgment for the defendant, unless the court should be of opinion that by any amendment in the form of proceedings the plaintiff might maintain the action.

H. W. Paine & E. R. Hoar (*C. F. Choate* with them), for plaintiff.

S. Lincoln, Jr., for defendant.

GRAY, C. J. It has long been a settled rule in this Commonwealth, in accordance with the law as understood in England at the time of our Revolution, that when a person, answerable in a contract to two jointly, settles with one of them, so that that one has no longer any real interest in the matter in dispute, it is a severance of the cause of action, and the debtor is liable in an action at law to the other alone. Lord MANSFIELD, in *Garret v. Taylor* (1764), and *Kirkman v. Newstead* (1776), 1 Esp. Dig. 117; 1 Chit. Pl. (2d Am. ed.) 7; *Austin v. Walsh*, 2 Mass. 401, 405; *Baker v. Jewell*, 6 id. 460, 461; *Holland v. Weld*, 4 Greenl. 255; *New Braintree v. Southworth*, 4 Gray, 304, 306; *Sawyer v. Steele*, 4 Wash. C. C. 227, 228.

A rule of practice, long recognized and acted on, and so simple and convenient, enabling a court of law to do justice between the parties, without joining as a formal plaintiff one who has no real interest in the controversy, or compelling a resort to equity, should not be reversed upon technical grounds, or because the modern rule in England is different. See *Hatsall v. Griffith*, 4 Tyrwh. 487; S. C., 2 Cr. & M. 679.

The original agreement of this defendant was with the plaintiff and the Eastern Railroad Company jointly. But the subsequent contract of that corporation with the defendant to pay, release and discharge all its debts, and to indemnify it against all demands, while it did not amount to a formal release, did put an end to all real interest of the Eastern Railroad Company in the liability sought to be enforced in this action.

There being nothing in the report to show that the application of the Massachusetts rule will produce any inconvenience or danger of injustice, the case, according to the terms of the reservation, is

Referred to an auditor.

FURNAS v. DURGIN.

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(119 Mass. 500.)

Breach of covenant of warranty — eviction — damages. Agreement to pay debt of another — action for breach of — damages.

In an action by a grantee of land against the grantor for breach of covenants of warranty in the eviction of the grantee by a mortgagee, *held*, (1) that entry of the mortgagee for foreclosure was a sufficient eviction, without actual ouster; and (2) that the measure of damage was the amount of the mortgaged debt and interest if that was less than the full value of the estate.

Land was conveyed "subject to mortgages amounting to \$6,500 which the grantee hereby assumes to pay." The grantee failing to pay one of said mortgages at its maturity, the grantor brought action for a breach of the agreement. *Held*, that the grantor had a right of action without having himself paid the debt or any part thereof, and that he could recover the amount of the mortgage unpaid with interest. (*See note, p. 346.*)

ACTION of contract for breach of a covenant of warranty in a deed of lands from defendant to plaintiff, and also for breach of an agreement by defendant to pay mortgages upon lands conveyed to him by plaintiff.

The plaintiff and defendant had bargained together to exchange lands. The defendant gave plaintiff a deed of his lands containing a covenant of seizin and of warranty against all incumbrances except one mortgage mentioned therein. Plaintiff alleged that there was subsisting on the land at the time of the said conveyance another mortgage for \$3,000 executed by a former owner, and then the property, by assignment, of Betsy Pope; and that after the conveyance the owner of the mortgage had entered upon the land for possession for breach of the condition of the mortgage and to foreclose, and that the plaintiff had thereby lost possession.

The deed from plaintiff to defendant conveyed land "subject to mortgages amounting to \$6,500 which the grantee hereby assumes and agrees to pay and all interest now due on existing mortgages on said property, together with the taxes due on the same." Among these mortgages was one for \$1,500, payable September 1, 1872, made by the plaintiff to George D. Cox, to secure the payment of the plaintiff's promissory note payable to the order of Cox, for the same amount and time, and of the same date. The note and mortgage were assigned by Cox to Joseph P. Paine, by deed of the same date, duly recorded.

The breach of contract alleged in the declaration was the non-payment of this note and mortgage.

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The only evidence offered as to the payment or non-payment of said note and mortgage was the testimony of Mr. Kittredge, who testified that as attorney at law he called on the defendant in reference to this mortgage within three days after maturity of the note, and that the defendant said he would pay it in a few days, and that he went two or three times after and received the same answer.

The defendant alleged and gave evidence tending to prove that there had never been a valid delivery and acceptance of either deed.

The defendant requested the judge to instruct the jury as follows, among other things :

“ If the jury are satisfied upon all the evidence that there was a good and legal delivery of the deed of the West Roxbury estate, and that there has been a breach of the covenants by defendant, then the measure of damages which the plaintiff would be entitled to recover would be the amount he had fairly paid to remove the incumbrance, and if he has paid nothing toward relieving the incumbrances he can recover only nominal damages.

“ If the jury are satisfied upon all the evidence that there was a good and legal delivery of the deed of the Hyde Park estate to the defendant and accepted by him after knowing its contents, and that the plaintiff is entitled to recover, the measure of damages would be the amount which plaintiff has paid to remove the incumbrance, and if he has paid nothing on said \$1,500, he would be entitled to recover only nominal damages.”

The judge refused to give these instructions ; but, after appropriate instructions as to what the plaintiff must prove, ruled that the measure of damages for breach of the agreement to assume and pay the mortgage on the Hyde Park estate would be the amount of the note and interest ; and that the measure of damages for breach of warranty in reference to the West Roxbury estate would be the amount necessary to redeem the same, namely, the mortgage debt outstanding, including interest.

The jury returned a verdict for the plaintiff, and assessed damages in the sum of \$2,740.30 ; and the defendant alleged exceptions.

F. A. Perry, for defendant.

H. N. Shepard, for plaintiff.

DEVENS, J. The plaintiff relies, to maintain his action, upon a breach by the defendant of the covenant of general warranty in the deed of the West Roxbury estate of the date of August 19, 1872,—this estate being

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at the time of its execution subject to a mortgage originally made to Michael E. Bowe, for the sum of \$3,000, and by intermediate assignments transferred to Betsy J. Pope, — and further, upon an eviction by Mrs. Pope, who, on December 29, 1872, made an entry upon the premises in order to foreclose the said mortgage.

The certificate of entry produced at the trial is made by the statute evidence of the fact of such entry. Gen. Stats., ch. 140, § 2; *Oakham v. Rutland*, 4 Cush. 172; *Thompson v. Kenyon*, 100 Mass. 108. There was no other evidence of eviction or of any actual ouster of the plaintiff from the occupancy of the premises, and the defendant contends that this entry was not an eviction which will enable the plaintiff to recover upon his covenant of warranty. But that it is so is settled by the law of this Commonwealth. *Tufts v. Adams*, 8 Pick. 547.

In *White v. Whitney*, 3 Metc. 81, 89, the facts, as stated in the opinion of the chief justice, are not distinguishable from those in the present case. The entry to foreclose was made under the provisions of the Rev. Stats., ch. 107, §§ 1, 2, which do not vary from those of Gen. Stats., ch. 140, and it was held that the "taking actual possession of the premises, by means of which the plaintiff was ousted," was a breach of the warranty. That case did not show, any more than the one before us, any actual ouster from occupancy of the holder of the equity of redemption, but from the time of such entry the legal possession was that of the mortgagee, whoever the occupant might be. Permitting the mortgagor to remain in occupancy during the three years does not render the entry any less effectual for the purpose of foreclosure. *Ellis v. Drake*, 8 Allen, 161; *Fletcher v. Cary*, 108 Mass. 475. The argument that, if the covenantee upon such eviction may recover his full damages, he may keep them and not devote them to the payment of the mortgage debt, leaving the covenantor still personally liable thereon, is one of force; but it is equally true that if the covenantee cannot recover his full damages when a step is taken, which, if not arrested, must deprive him of his estate, he may lose it simply because by reason of the mortgage upon it he may be without the means of raising money upon his only security. The covenantor can avoid this difficulty by doing what he ought, namely, paying the debt at any time before judgment, thus reducing the damages to those merely nominal.

The rule of damages, as given by the court, was also correct. The general rule is that, where the grantee becomes seized, the estate having passed by force of the conveyance, and is afterward evicted by a paramount title, the value of the estate at the time of eviction is the measure of damages. *Gore v. Brazier*, 3 Mass. 523, 543; *Norton v. Babcock*, 2

Metc. 510. It has been held, however, in favor of the covenantor, that when the mortgage is less than the value of the land, and it would be plainly for the interest of the holder of the equity of redemption to redeem, the covenantee on such eviction shall recover only the amount of the mortgage, with interest, and not the full value of the estate. *Tyfts v. Adams, ubi supra*; *White v. Whitney, ubi supra*.

The plaintiff also claimed to recover of the defendant for breach of the agreement in the deed of the Hyde Park estate to the defendant, which was accepted by the defendant, and contained this clause: "Subject to mortgages amounting to \$6,500, which the grantee hereby assumes and agrees to pay, and all interest now due on existing mortgages on said property, together with the taxes due on the same."

For the debt secured by the mortgage the plaintiff was liable, and the question presented is whether the plaintiff is entitled to recover nominal damages only, as contended by the defendant, or whether he may recover the amount of a mortgage upon the estate of \$1,500, with interest, which neither party has paid. The precise question involved here was raised in *Brewer v. Worthington*, 10 Allen, 329, but it was not there necessary to decide it. If the agreement is to be treated as one merely to indemnify the plaintiff against any loss or damage by reason of this mortgage, it would be necessary to show that he had been in some measure damnified thereby. *Little v. Little*, 13 Pick. 426. But there is no reason why an agreement may not be made which shall bind the party so contracting to pay the debt which another owes, and thus relieve him or his estate from it, and, if the promise thus made is not kept, why the promisee should not recover a sum sufficient to enable him so to do. Such is the construction to be given to the agreement in the case before us. As a consideration for the property conveyed to him, the plaintiff conveyed the Hyde Park estate to the defendant, who contracted not to indemnify the plaintiff against, but to pay the mortgages upon it, and, if he has failed to do this, the plaintiff should be entitled to recover the amount which the defendant thus agreed to pay. It is a portion of the consideration money due the plaintiff, which he was to receive by payment of a debt for which he was liable, which he thus recovers, when the defendant fails to perform his promise. That the plaintiff should be kept subject to a debt from which the defendant agreed to relieve him is a continuing injury for which a sum of money which will enable him to discharge it is an appropriate remedy in damages.

That a promise to pay a debt due from the promisee, even where it has not been paid by him, is one upon which an action may be maintained and damages recovered to the amount of such debt, is held by many

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authorities. *Holmes v. Rhodes*, 1 B. & P. 638; *Cutler v. Southern*, 1 Saund. 116, Wms.' note; *Toussaint v. Martinnant*, 2 T. R. 100; *Martin v. Court*, id. 640; *Hodgson v. Bell*, 7 id. 97; *Thomas v. Allen*, 1 Hill, 145; *Loosemore v. Radford*, 9 M. & W. 657; *Penny v. Foy*, 9 B. & C. 11. In *Lethbridge v. Mytton*, 2 B. & Ad. 772, the defendant, by a settlement made upon his marriage, conveyed an estate upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estate to the amount of £19,000, within a year, and it was held, upon his failure to do so, that the trustees were entitled to recover the whole £19,000 in an action of covenant, although no payment had been made by them, and no special damage was laid or proved. Whether the contracts in some of these cases were any thing more than contracts of indemnity, and therefore whether there could under our decisions have been any recovery, might perhaps be questioned. *Cushing v. Gore*, 15 Mass. 69; *Little v. Little*, *ubi supra*. That, however, need not now be considered, as we treat the agreement before us as one not for indemnity merely, but for payment. Nor is it important that the cases above cited are those in which the promisor agreed to pay on a particular day, or within a specified time. That cannot affect their application. An agreement to pay a debt, no time being specified, is an agreement to pay it when due, or forthwith, if it be already due. Here it appears that the promise was made on August 19, 1872, that the mortgage debt which the defendant was to assume and pay became due on September 1, 1872, and that the action was brought on March 10, 1873. That an action may be brought upon a promise to pay a debt due from the promisee, and, although he has not paid the same, full damages recovered, is recognized clearly by the case of *Goodwin v. Gilbert*, 9 Mass. 510. The question is not there discussed in the opinion of the court, which treats another inquiry as the only one important in the case, but, having disposed of that in favor of the plaintiffs, judgment was rendered for the full sum.

There is an embarrassment undoubtedly where the agreement is to pay a debt due from the promisor as well as the promisee. It is similar to that heretofore considered, where there is an eviction by one holding a mortgage title, and the covenantee is allowed to recover in damages the amount of the mortgage upon which the covenantor is personally liable. As the Hyde Park estate, now the property of the defendant, is charged with the payment of the mortgage debt, if the plaintiff should not devote the sum recovered by him to its payment, the defendant might hereafter, in order to relieve his property, be compelled to pay the amount a second time. There is no mode, at law, by which the difficulty can be avoided and the plaintiff enabled to receive the benefit of his contract. *Loose*

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more v. Radford, ubi supra. Perhaps in equity, where a proper case for its interference was shown, a remedy would be afforded, that would secure the party paying under such circumstances from having the payment made by him devoted to any other object than that which would relieve him or his estate from further responsibility. However this may be, the want of elasticity in the forms of the common law, which does not enable us to make such a decree here as would guard the rights of all parties, should not prevent us from giving to the plaintiff the benefit of the contract which he has made, or compel him to remain subject to the burden of the debt, which the defendant has agreed to extinguish. As we suggested upon the other part of the case, the defendant may, if he will, perform his agreement and pay the debt at any time before final judgment, and the damages then to be recovered will be nominal only.

The other exceptions argued by defendant were not important.

Exceptions overruled.

NOTE.—As to the eviction, see *Cowdry v. Coit*, 44 N. Y. 382; S. C., 4 Am. Rep. 690; *McGary v. Hastings*, 39 Cal. 360; S. C., 2 Am. Rep. 456; 3 Wash. on Real Prop. (4th ed.) 477; Rawle on Cov. 143, 213; Sugd. on Vendors (8th Am. ed.), 271; Perkins' note; Hill on Real Prop. (4th ed.) 588.

As to measure of damages for the eviction, see *McGary v. Hastings*, 39 Cal. 360; S. C., 2 Am. Rep. 456; *Mack v. Patchin*, 42 N. Y. 167; S. C., 1 Am. Rep. 506; Rawle on Cov. 168, 267, *et seq.*; Sugd. on Vendors (8th Am. ed.), 285, *et seq.*; Sedg. on Dam. (6th ed.) 191; Field on Dam. 366.

Williams says in his note to *Cutler v. Southern*, 1 Saund. 116, "But in all cases of conditions to indemnify and save harmless, the proper plea is *non damnificatus*, and if there be any damage the plaintiff must reply it. This plea, however, cannot be pleaded where the condition is to discharge or acquit the plaintiff from such a bond, or other particular thing, for then defendant must set forth affirmatively the special manner of performance," citing the cases. In *Thomas v. Allen*, 1 Hill, 145, the bond sued on was conditioned to pay a sum of money for the plaintiff on a bond and mortgage executed between third persons, and to save the plaintiff harmless; and the court sustained debt thereon on the allegation merely that the debt became due and was not paid at the day, holding that the bond was more than a bond of indemnity. See, also, *Port v. Jackson*, 17 Johns. 239 and 479, in effect overruling *Douglas v. Clark*, 14 Johns. 177. See, also, *Juliand v. Burgott*, 11 Johns. 477; *Wright v. Whiting*, 40 Barb. 235; *Churchill v. Hunt*, 3 Den. 321; *Gilbert v. Wiman*, 1 N. Y. 550; *Jarvis v. Sewall*, 40 Barb. 449; *Ham v. Hill*, 29 Mo. 275; *Lathrop v. Atwood*, 21 Conn. 117; *Redfield v. Haight*, 27 Conn. 81; *Hodgson v. Wood*, 2 H. & C. Exch. 649; *Rector of Trinity v. Higgins*, 48 N. Y. 532.

In the last case a lessee covenanted to "bear, pay and discharge all such duties, taxes, and assessments," as should be imposed on the demised premises, and it was held that the covenant was broken when the lessee neglected to pay an assessment duly imposed, and that the lessor could maintain an action without himself first paying, and could recover the full amount of the assessment. LEONARD, C., disapproved of the contention of Sedgwick against such a rule of damages. See Sedg. on Dam. 306. In *Hum v. Hill*, *supra*, the measure of damage was said to be the amount of debts provided for in the agreement.—RER.

Day v. Caton.

DAY V. CATON.

(119 Mass. 513.)

Promise — when implied.

In an action to recover the value of one-half of a party wall erected by the plaintiff partly on his estate and partly on that of the defendant, the jury may, in the absence of an express agreement as to payment on the defendant's part, infer a promise to pay, if the plaintiff undertook and completed the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection.

CONTRACT to recover the value of one-half of a brick party wall built by the plaintiff upon and between the adjoining estates, 27 and 29 Greenwich Park, Boston.

At the trial in the Superior Court, before ALLEN, J., it appeared that, in 1871, the plaintiff, having an equitable interest in lot 29, built the wall in question, placing one-half of it on the vacant lot 27, in which the defendant then had an equitable interest. The plaintiff testified that there was an express agreement on the defendant's part to pay him one-half the value of the wall when the defendant should use it in building upon lot 27. The defendant denied this, and testified that he never had any conversation with the plaintiff about the wall; and there was no other direct testimony on this point.

The defendant requested the judge to rule that, "1. The plaintiff can recover in this case only upon an express agreement."

"2. If the jury find there was no express agreement about the wall, but the defendant knew that the plaintiff was building upon land in which the defendant had an equitable interest, the defendant's rights would not be affected by such knowledge, and his silence and subsequent use of the wall would raise no implied promise to pay any thing for the wall."

The judge refused so to rule, but instructed the jury as follows: "A promise would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall and the defendant used it, but it might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation and allowed him so to act without objection, then the jury might infer a promise on the part of the defendant to pay the plaintiff."

The jury found for the plaintiff; and the defendant alleged exception.

H. D. Hyde & M. F. Dickinson, Jr., for defendant.

F. W. Kittredge, for plaintiff.

DEVENS, J. The ruling that a promise to pay for the wall would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall, and that the defendant used it, was substantially in accordance with the request of the defendant, and is conceded to have been correct. Chit. on Cont. (11th Am. ed.) 86; *Wells v. Banister*, 4 Mass. 514; *Knowlton v. Plantation No. 4*, 14 Me. 20; *Davis v. School District in Bradford*, 24 id. 349.

The plaintiff, however, contends that the presiding judge incorrectly ruled that such promise might be inferred from the fact that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, the defendant having reason to know that the plaintiff was acting with that expectation, and allowed him thus to act without objection.

The fact that the plaintiff expected to be paid for the work would certainly not be sufficient of itself to establish the existence of a contract, when the question between the parties was whether one was made. *Taft v. Dickinson*, 6 Allen, 553. It must be shown that, in some manner, the party sought to be charged assented to it. If a party, however, voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. His knowledge that they were valuable, and his exercise of the option to avail himself of them, justify this inference. *Abbot v. Hermon*, 7 Greenl. 118; *Hayden v. Madison*, id. 76. And when one stands by in silence and sees valuable services rendered upon his real estate by the erection of a structure (of which he must necessarily avail himself afterward in his proper use thereof), such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it.

The maxim, *Qui tacet consentire videtur*, is to be construed indeed as applying only to those cases where the circumstances are such that a party is fairly called upon either to deny or admit his liability. But if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak. *Lamb v. Bunce*, 4 M

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& S. 275 ; *Conner v. Hookley*, 2 Metc. 618 ; *Preston v. American Linen Co.*, 119 Mass. 400.

If a person saw day after day a laborer at work in his field doing services, which must of necessity inure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence, with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding judge.

Exceptions overruled.

 SNOW V. UNION MUTUAL MARINE INSURANCE COMPANY.

(119 Mass. 592.)

Marine insurance — constructive loss — abandonment.

In an action on a policy of marine insurance it appeared that the insured vessel, being jammed fast in the ice in the Arctic Ocean with no open water in sight and drifting northward with the current, her officers and crew finding it impossible to extricate her, left her and took to the boats and succeeded after three days in reaching the whaling fleet fifty miles south. Ten days afterward, by a change of wind and current, the ice loosened and the vessel was brought out by the master and crew of another vessel and held by them for salvage; but the master of the insured vessel, whose crew had become scattered in other vessels and some of whom had started homeward, was unable to obtain a sufficient crew or to regain possession of the vessel so as to pursue the voyage in which she was employed and for which she was insured, and she was brought by the salvors to San Francisco, and before her arrival at that port abandoned by her owners to the underwriters. *Held*, a constructive total loss and that the abandonment was good.

CONTRACT on a policy of insurance on the ship *Helen Snow* and outfits, "wherever she may go on a whaling voyage," from October 14, 1871, to October 14, 1875. The vessel was valued at \$10,000, and the outfits at \$20,000.

The declaration was as follows: "And the plaintiff says the defendant made to him a policy of insurance, a copy of which is hereto annexed, for the sum of eighteen hundred and seventy-five dollars, on bark Helen Snow, against the perils of the seas and other perils therein mentioned, on a whaling voyage during the time in said policy set forth; and while engaged upon said whaling voyage, the said bark was encompassed in heavy masses of ice in the Arctic Ocean, and so rendered unnavigable and at the mercy of the currents and the masses of ice around her, and in danger of immediate destruction by being crushed or set aground, with all her outfits, cargo and stores, so that the officers and crew for the safety of their lives were compelled to leave and abandon her, and seek safety in finding their way on the ice to some other ships or to the land, and so the said whaling voyage was utterly broken up and lost, and said ship and her outfits, cargo and stores were totally lost by the perils of the seas and perils insured against in said policy; and the defendant had due notice thereof, and became bound to pay the sum insured in said policy to the plaintiff, as provided in said policy, before the date of the writ in this case. And the defendant owes the plaintiff therefor said sum of eighteen hundred and seventy-five dollars and interest thereon, as for a total loss under said policy."

At the trial in this court, before WELLS, J., it appeared that the vessel was left by the master and crew in the Arctic Ocean on August 21, 1872; that the vessel was abandoned to the underwriters on October 14, 1872, and on November 1, 1872, the vessel arrived at San Francisco in the possession of salvors. The plaintiff also put in evidence on which the judge directed that the following questions of fact should be submitted to the jury: "1. Whether the master, officers and crew of the Helen Snow were warranted, by necessity resulting from a peril insured against, in leaving the ship, as they did, on August 21, 1872. 2. Whether, up to the time of the written abandonments, the plaintiffs had an opportunity to resume possession of the ship, for the purpose of pursuing the voyage for which she was insured, of which they did not avail themselves."

The defendant contended that the evidence would not warrant the jury in answering these questions in favor of the plaintiff, and declined to go to the jury thereon, agreeing that if the jury would be warranted in finding these issues in favor of the plaintiff, the case should stand as if these issues had been so found. The plaintiff then asked the judge to rule that, upon these findings, he was entitled to recover a total loss. The judge declined so to rule.

The defendant objected that, under the declaration, no evidence of a

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constructive total loss would be admissible. The objection was overruled, and the case was reported for the consideration of the full court. If the findings for the plaintiff, upon the two issues submitted to the jury, would entitle him to a verdict for a total loss, then judgment was to be entered for the plaintiff for a total loss, if the court should also find that there was any evidence on which the jury might properly have found upon these issues for the plaintiff; otherwise, for the defendant, or the case to stand for trial, for proof of a partial or constructive total loss, if the action could be maintained under the declaration. Annexed to the report was a copy of the evidence in the case, the nature of which appears in the opinion.

G. Marston & C. W. Clifford, for plaintiff.

T. M. Stetson, for defendant, cited *Falkner v. Ritchie*, 2 M. & S. 290; *Parsons v. Scott*, 2 Taunt. 368; *Naylor v. Taylor*, 9 B. & C. 718; *Bainbridge v. Neilson*, 10 East, 329; *Thornely v. Hebson*, 2 B. & Ald. 518; *Underwood v. Robertson*, 4 Camp. 138; *Anderson v. Wallis*, 2 M. & S. 240; *Pole v. Fitzgerald*, Willea, 641; *Brotherston v. Barber*, 5 M. & S. 418; *Everth v. Smith*, 2 id. 278; *Hunt v. Royal Exchange Assurance*, 5 id. 47; *Wood v. Lincoln Ins. Co.*, 6 Mass. 479; *Greene v. Pacific Ins. Co.*, 9 Allen, 217.

GRAY, C. J. The evidence introduced at the trial would warrant the jury in finding that the *Helen Snow*, being jammed fast in the ice in the Arctic Ocean, with no open water in sight, and drifting northward with the current, her officers and crew, finding it impossible to extricate her with the utmost efforts, and nearly worn out with fatigue and want of sleep, in order to save their lives, left her and took to the boats, bringing away the guns and whaling gear, and by passing through narrow strips of water, and hauling the boats over the ice for two or three days, reached the whaling fleet, fifty or sixty miles south of where they left the vessel; that the officers and crew, with the boats, guns and whaling gear, being scattered in other vessels, and some of them having gone homeward, ten days afterward, by a change of the wind and currents, the ice loosened, and the *Helen Snow* was brought out by the master and crew of another vessel, and held by them for salvage; and that the master of the *Helen Snow*, although he made reasonable efforts so to do, was not able to obtain a sufficient crew or whaling craft, or to regain possession of the vessel so as to pursue the voyage on which she was employed and for which she was insured, and she was brought by the

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salvors to San Francisco, and, before her arrival at that port, abandoned by her owners to the underwriters.

By our law, the right to recover for a constructive total loss, or abandonment to the underwriters, depends upon the state of facts when the abandonment is made; and the abandonment, if justified by those facts, relates back to the time of the loss. It is true that a loss of the voyage is not necessarily a loss of the ship, within the meaning of a policy of insurance upon her. But if the ship herself is once totally lost by a peril insured against, and the master, using due diligence, is unable to regain possession of her in such a condition and under such circumstances as to enable her to pursue the voyage for which she was insured, the right to abandon and to recover for a constructive total loss still remains, without regard to the question whether at some future time, over which the master has no control, he might be able to regain possession of her on payment of salvage, and without regard to the proportion between the amount of the salvage and the value of the vessel.

In the present case, the leaving of the vessel in the ice, made necessary by a peril insured against, was a constructive total loss, and would clearly have warranted an abandonment to the underwriters at any time before she was rescued. Her subsequent rescue by salvors, her master never having been able to resume possession of her so as to prosecute her voyage, did not cut down this total loss to a partial one, but there was still a constructive total loss of the vessel at the time of the abandonment to the underwriters.

The case is within the principle of *Greene v. Pacific Ins. Co.*, 9 Allen, 217. See also *Peele v. Merchants' Ins. Co.*, 3 Mason, 27, in which the principal English cases relied on by the defendant are fully considered and distinguished.

The declaration alleges a total loss substantially in the form allowed by the practice act, as well as by the rules previously established by this court. Gen. Stats. 665; 24 Pick. 406. The allegation of a total loss, like the corresponding words in a policy of insurance, covers a constructive as well as an actual total loss. *Heebner v. Eagle Ins. Co.*, 10 Gray, 131. It is not necessary, under our practice, to allege the abandonment or other facts necessary to constitute the total loss relied on.

The evidence at the trial being sufficient to prove a constructive total loss by the cause alleged in the declaration, it follows that, according to the terms of the report, there must be

Judgment for the plaintiff for a total loss.

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HAWKINS V. PROVIDENCE AND WORCESTER RAILROAD COMPANY.

(119 Mass. 596.)

Married women — paraphernalia — action for injury to.

A married woman cannot maintain an action against a carrier for loss of personal apparel furnished to her by her husband or purchased by her with moneys given to her by him from a fund formed by their joint earnings. (*See note, p. 355.*)

ACTION of contract with a count in tort, for the loss of personal property. The plaintiff was a married woman living with her husband. The property lost was delivered to the defendant as the baggage of plaintiff who was at the time a passenger on defendant's road. It consisted of clothing suitable for the plaintiff, which plaintiff testified she had purchased from time to time with money given to her by her husband from a fund formed by their joint earnings in a mill wherein they both worked.

The defendant asked the judge to direct a verdict for defendant, which request was refused.

The judge instructed the jury as follows:

"If the wife purchased the articles with the husband's money, given her by him, or with her own money, or with money from a fund created by mingling the earnings of wife and husband, she would have such a title to these articles of her personal apparel as would enable her to recover their value in this action."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions to the refusal to rule as requested, and to the rulings given.

J. Hopkins, for defendant.

B. K. Lovatt, for plaintiff.

AMES, J. The statutes which from time to time have been enacted in this Commonwealth, for the purpose of enlarging the rights and privileges of married women, have not in terms made any specific regulations in regard to the ownership of their wearing apparel. Except in cases where the wife herself purchases it with her own separate money or earnings, that matter remains exactly as it stood at common law. At common law, the husband is bound to maintain the wife, and to provide her with suitable clothing appropriate to their degree and his own circumstances and social position. If the articles of clothing and personal

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ornament appropriate for her are purchased with his money or upon his credit, the fact that they are selected and purchased by her, and are intended for her personal and exclusive use, does not render them any the less his property. In this respect, the clothing of the wife comes under the same general rule as the clothing of the minor children in the same family. The provision of the Gen. Stats., ch. 96, § 4, that "the articles of apparel and ornament of the widow and minor children of a deceased person shall belong to them respectively," furnishes a strong implication that, without such a provision, they would constitute a part of the assets of the deceased person's estate, and would be liable as such to be sold for the payment of his debts. It was to prevent the distress and inconvenience in this respect, which would result from the common-law rule as to such property, that this statute regulation was found to be necessary. The provision of the Gen. Stats., ch. 133, § 32, among the "articles of the debtor" exempt from attachment for his debts, includes the "necessary wearing apparel of himself and of his wife and children;" a provision which would be wholly unnecessary if these articles were not his property.

The property sued for in this action consists mainly of the plaintiff's personal clothing; and if it had been purchased by her with her own money, that is to say, with money which was literally her own, and belonged to herself separately and exclusively, the action in her name might well be maintained. But we find nothing in the facts reported to support that view of the case. On the contrary, we find that the relation in which she and her husband stood to each other was exactly the ordinary relation of husband and wife as it stood at common law, unaffected by any of the recent legislation upon that subject. It does not appear that she had any separate property of her own, or that she was following any trade or business of her own, requiring a certificate to be filed in pursuance of the Stat. of 1862, ch. 198. She and her husband worked in the same mill, and under the Stat. of 1874, ch. 184, § 1, the work and labor of a married woman shall be presumed to be on her separate account. Under that statute, therefore, she could have kept her earnings separate, if she saw fit to do so. But this is a privilege which she might waive, and her allowing them to be mingled with those of her husband would be *prima facie* evidence that she had done so. *Kelly v. Drew*, 12 Allen, 107. The money with which she purchased the clothing described in the declaration appears from the bill of exceptions to have been given to her by her husband from a fund made up of her and his earnings. We see no ground on which we can say that this joint fund, or any part of it, was her separate property. She was the custodian, but

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did not thereby become exclusively the owner of it. And, as we must assume that this fund was used in paying the necessary expenses of the family, the presumption referred to in the statute last quoted is effectually rebutted. The husband was legally responsible for these expenses, and the fund was his property. The case does not resemble, as it is suggested by the plaintiff's counsel, the case of a willful confusion of goods. The money given to her from that fund was her husband's money and not hers, intrusted to her as his agent, and, in pursuance of his legal obligation to support and clothe her, to be used in payment of articles which he was bound to supply, and which might properly be charged to him. There can be no valid gift of money or property by the husband to the wife. Gen. Stats., ch. 108, § 10; *Thomson v. O'Sullivan*, 6 Allen, 303; *Baxter v. Knowles*, 12 id. 114. It would remain his property notwithstanding such gift.

In this view of the case, the instructions requested by the defendant should have been given, and those actually given were incorrect and inappropriate.

Exceptions sustained.

NOTE.—Under the statutes of New York a married woman can sue in her own name for injury to her paraphernalia. *Ransom v. Penn. R. R. Co.*, 48 N. Y. 211; 8 C., 8 Am. Rep. 543. See 1 Blah. Mar. Women, 220, note.—**REP.**

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the locomotive of the defendant; and in lieu thereof, and for the purpose of showing an omission of duty on the part of the defendant, sets forth that the railroad track was suffered to be incumbered with combustible matter, and that the fire in question was caused by igneous cinders falling from the locomotive upon such matter, and being thence communicated to the woodland of the plaintiff. The duty of the defendant, in this respect, is stated in these words, viz.: "And thereupon it became the duty of the defendants, when said locomotive engines were being propelled along said railroad track, to preserve and keep the said strips of land in such a condition that fire should not be occasioned by reason of the hot ashes, burning coals, and other igneous matter falling and settling thereon from out of the said locomotive engines, and to take all necessary precautions to prevent any fire which might be occasioned on said strips from extending to and burning the said sprouts, wood, timber, and fences on the said last-mentioned track of the said plaintiff." The neglect of this duty is the gravamen of these two counts; and for the purpose of testing their sufficiency, the defendant has put in a demurrer.

The question, therefore, on this issue is, whether a railroad company owes to the owner of the adjacent land the duty of keeping its track clear of matter liable to become ignited by fire from its locomotives—such engines being constructed in all respects, in a legal manner, and being handled with care and skill.

After a careful consideration of this subject, my opinion is, that the duty in question was incumbent on the defendant. Such duty appears to arise, by reasonable intendment, out of legislative grant to these corporations of the franchise to run their locomotives. In the absence of chartered rights, the use of such engines in the usual way, traversing whole districts, and throwing cinders and particles of fire on all sides, over the lands in the vicinity of the road, would be, upon the ordinary principles of the law, undeniable nuisances. But, in view of the necessities of our advanced civilization, the use of such instruments has been legalized. In the name of the public, the landed proprietor has been compelled to submit to annoyance, and to yield up a portion of his abstract rights to the convenience of the community. But such sacrifice, on the part of the land-owner, under the enlightened policy of this State as well as under that of all other civilized countries, has been made as light as practicable. If the land of the citizen has been taken from him by compulsion, it has been paid for; and where he has been subjected to other loss, he has received compensation. Nor is this all; he has another guaranty against oppression, which is, that the privileges held by these companies are all granted on the implied condition that they are to be so

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used as to occasion no unnecessary injury to the citizen. If it is legal to run their engines, such engines must be of the best construction ; and if they can scatter their cinders and sparks, it can be done only within the limit of a strict necessity. If, in these respects, such stringent obligations exist, why are these companies to be dispensed from all obligation, if their tracks are left in a dangerous condition with respect to fire ? They are bound to prevent, by the use of the most approved device, the escape of the fire from their engines ; what absolves them from all care as to such fire as soon as it has left such engines ? It is presumed that no one would claim immunity for one of these companies if it should place stacks of hay or straw in close vicinity to its track, and firing them, as it undoubtedly would, with its engine, should thus communicate the fire to the adjacent lands ; and yet it is not easy to see the principle that would impose a responsibility in such case which would not do so for the omission to put its track in a safe condition. We are apt to forget, when we consider this subject, that the entire irresponsibility possessed by these companies for damage done by the fires which they occasion in the due exercise of their privileges, is derived exclusively from their charters ; but bearing this fact in mind, it becomes much less difficult to assign the limit to such irresponsibility. Being simply clothed with the legal capacities of ordinary persons, if by the use of an engine on their own lands filled with combustible matter, they should fire such matter, and the flames should be carried on to the lands adjacent, there would be no question as to the responsibility for such an act ; and the question, in such cases as the one now before us, therefore is, with respect to the extent of the immunity which has been given to these artificial persons. The inquiry, in fact, is simply as to the construction, in this particular, of the charter of the corporation. Did the legislature mean to exempt such corporations from all that liability to which, at the common law, they would have been subject, for firing their own land under the conditions already specified ? I can see no reason to infer, either from the language of the charter of this company, nor from the business authorized, that such was the legislative intention. That a railroad company should be exonerated from liability for fire unavoidably caused by sparks from their engine, was reasonable enough ; but that such exoneration should be given for fire originating from combustible matter unnecessarily being on their own land, would seem to be a superfluous concession. It should never be forgotten, that grants of this kind are to be construed strictly, and, as was intimated by Lord LANGDALE (*Colman v. Eastern Counties R. C.*, 10 Beav. 1), as it is the public interest to protect, as far as possible, the rights of every individual, such grants must always be carefully looked

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to, and must not be extended further than the legislature has provided, or than is properly required for the purposes which it has sanctioned. There appears to be no reason whatever, why, to the evident detriment of the owners of lands along a railroad track, a privilege should be conferred on such company to run their locomotives, surrounded on their own premises by materials so combustible as to be in constant danger of being fired by such engines when running under ordinary conditions.

This precise question does not appear to have been very much considered by the courts. There are only two English cases which seem directly to touch the subject; the first being that of *Vaughan v. Taff Vale Railway Company*, 5 Hurl. & Norm. 679. In this case there were two counts in the declaration; the first count charging that the fire was communicated directly by sparks from the engine; the second count averred that the premises of the defendant were out of order, from having been left in a state liable to combustion, and that thereby the fire complained of had occurred. In the Exchequer Chamber, Chief Justice COCKBURN, in the course of his remarks, says: "As regards the second count, if the facts alleged in that count had been established by the verdict of the jury, the defendants would have been liable." But the exigency did not require the point to be decided, so that all that can be claimed from this case is that it contains this weighty expression of opinion on the matter in question.

The other case, which is closely pertinent, is that of *Smith v. The London and South Western Railway Company*, reported in L. R., 5 Com. Pleas, 98. The circumstances were that the workmen of the company had left, for several weeks during the dry weather, the cuttings from the grass and hedges along the line of the road, which, taking fire from an engine properly constructed and driven, the sparks and flames were carried over intervening lands to the property of the plaintiff. It thus appears that the only negligence alleged was the omission to keep the track free from inflammable matter; and an examination of this report will show that neither the counsel of the railroad company nor the court suggested a doubt with respect to the legal duty of the company to see that its premises were in such a condition. The judgment in the case was in favor of the plaintiff.

A similar responsibility on the part of railroad companies has been enforced by the courts of some of the western States, as will appear from some of the decisions to be hereafter cited on the point next to be considered.

But there is another aspect to this case.

Besides the counts already considered there are four others, and these

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latter ones, unlike the former, contain an averment that the fire communicated to the premises of the defendant, and thence spreading to the land of the plaintiff, originated from the carelessness of the defendant in the use of its locomotives. To these counts there is a special plea, the object of which is to set up contributory negligence on the part of the plaintiff. The facts stated with this view are, that the lands of the plaintiff, adjoining the railroad, "were covered with living, growing trees, saplings, and bushes, etc., which annually produced and shed great quantities of leaves;" that the plaintiff, "during all that time, took no care of or in regard to said leaves, and did nothing whatever to prevent them from blowing and drifting from the said lands of the said plaintiff to, over and upon the said railroad track of the said defendant, but permitted them to be and remain where they fell, on his said tracts of land, to there become dry and inflammable, and then to be from thence, by the winds, from time to time, driven, carried, and thrown from the said lands of the said plaintiff to and upon the said lands and railroad track of the said defendant, and in such manner that said leaves formed a continuous line of dry, combustible matter, extending from the said lands and railroad track of the defendant to the said lands of the said plaintiff, and that said leaves, "while the said defendant was using its said railroad, and its locomotive engines thereon, in a lawful and careful manner, accidentally and unavoidably caught fire," and thence the injury complained of.

This plea, it is manifest, demands for its support the concession, that the law requires a man to alter the natural conditions of his property, and to control, in some degree, the operation of the laws of nature with respect to such property, in favor of the owner of the adjacent lands. But this concession, I think, cannot be made. In the absence of special legislation, a man does not become a wrong-doer by leaving his property in a state of nature. If water falls from the clouds upon its surface, the owner is not obliged to counteract the law of gravity in order to prevent such water from flowing on to the adjacent land; or if the soil becomes disintegrated by the action of the heat, he is under no duty to prevent the dust thence arising from being carried through the air into the house of his neighbor. Such results are purely sequences of natural causes, and, like all other effects of the *vis major*, must be submitted to; they cannot, in themselves, form any ground for a legal complaint. When this plea, therefore, attempts to fashion a wrong out of such matters, the very essence of legal liability, in this department of torts, is overlooked. Legal negligence does not consist simply of an omission to do that which would have prevented the infliction of damage on another, but, in addition to this, it involves a breach of duty. Mr. Wharton, in his complete

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and carefully considered definition of negligence, in its civil relations, says it "is such an inadvertent imperfection, by a responsible human agent, in the *discharge of a legal duty*, as immediately produces, in an ordinary and natural sequence, a damage to another." Law of Neg., § 2. This plea charges that the plaintiff did not prevent the leaves falling from his trees, from being carried by the wind to the land of the defendant, but it altogether fails to show that he was under any legal obligation so to do. If the law annexed such a condition as that to the ownership of land, an action would lie for every leaf that should be blown by the wind from the trees upon such land to the neighboring property. But there is no such obligation known to the law. All land is subject to the servitude of receiving the leaves brought to it in the course of nature, and, as a compensation, can dispose of its own leaves in the same manner. The consequence is, there was no negligence in the plaintiff's allowing the leaves in question to be carried to the roadway of the defendant, and that being so, it follows that, being on the land of the defendant right fully, it became its duty to remove them when it desired to use fire or its land under dangerous conditions.

Under the force of the principles thus adopted, it becomes also manifest that the plaintiff is not chargeable with any legal neglect from leaving fallen leaves, the product of the trees, on his own land. It was his right to leave them there. A person is not called on to anticipate negligence on the part of another, and, by way of prevention, to make provision against its effects. The fire in question, upon the facts stated in these pleadings, was caused solely by the illegal act of the defendant, and there is no provision of law which required the plaintiff to foresee the doing of such an act, and to put his own land in a situation to withstand its effect. He owed no duty to the defendant in this respect, and, consequently, negligence, in the legal sense, cannot be imputed to him. It never would be thought that a person owning land in the vicinity of a canal was bound to raise embankments around such property, to guard against its overflow from water escaping by negligence from such artificial aqueduct, and yet the contention for the existence of such an obligation would be quite as tenable as is the claim that the present plaintiff was bound to put his property in a condition to withstand a fire proceeding from the heedlessness of the defendant. I am aware that it has been ruled in Illinois, that the owners of lands contiguous to railroads are as much bound to keep their lands free from dry grass and weeds as the railroad company is on its roadway, but I regard such cases as opposed to well-settled legal principles. *Ohio & M. R. R. Co. v. Shanefelt*, 47 Ill. 497; *Illinois Central R. R. Co. v. Frazier*, id. 505; *Ill. Central R.* VOL. XX.—46

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R. Co. v. Nunn, 51 id. 78. If this is the doctrine of the law, it is, I think, entirely manifest that the long line of decisions on the subject of the careless use of fire by a proprietor, on his own property, which we find in the books, have been rendered in utter disregard to this important condition. The ruling of the courts has invariably been, that every proprietor is responsible for the ordinary and natural consequences of the careless use of fire on his own premises, and this without the least reference to the condition of the adjacent lands, to which the conflagration has spread. No support, in any of these authorities, can be found for the assumption, that if a land-owner places his stacks of grain or hay on the confines of his land, that thereby, in a legal point of view, he becomes a contributor to a fire occasioned by negligence on the land of his neighbor. By such an act, it is true, he takes the risk of the consequences of an accidental fire on the contiguous premises, but not of a neglect which he can be called upon neither to anticipate nor to guard against. In the leading case in Illinois it is assumed, that the same duty which will compel the railway company to clear its roadway of combustibles imposes an equal obligation on the owner of the contiguous land, but the distinction between the cases is obvious: the company uses a dangerous agent, and must provide proper safeguards; the land-owner does nothing of the kind, and has a right to remain quiescent.

The plaintiff should have judgment.

NOTE.—See *Atchison, etc., R. R. Co. v. Stanford*, 15 Am. Rep. 362; *Fent v. Toledo, etc., Ry. Co.*, 14 id. 13; *Clemens v. Hannibal, etc., R. R. Co.*, id. 460; *Gagg v. Vetter*, 13 id. 322; *Higgings v. Dewey*, 9 id. 63; *Webb v. Rome, etc., R. R. Co.*, 10 id. 389; *Jackson v. Chicago, etc., Ry. Co.*, 7 id. 120; *Steinweg v. Erie Ry. Co.*, 3 id. 673; *Keese v. Chicago, etc., Ry. Co.*, 6 id. 643; *Kellogg v. Chicago, etc., Ry.*, 7 id. 69 and note; *Chicago, etc., Ry. Co. v. Simonson*, 5 id. 155; *Penn. R. R. Co. v. Kerr*, id. 431; *Toledo, etc., R. R. Co. v. Pindar*, 5 id. 57; *Bedell v. Long Island R. R. Co.*, 4 id. 688; *Flynn v. San Francisco, etc.*, 6 id. 595 and note.

See, as to burden of proof, *Burke v. Louisville, etc., R. R. Co.*, id. 618 and note.—*Rwp.*

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(9 Vroom, 32.)

Partnership — effect of payment by one partner after dissolution, on statute of limitation.

Payment of interest on a note drawn by a firm, by one of the members, after the dissolution of the firm, but within six years after the maturity of such note, will renew it, as against the statute of limitations; nor will the fact that one of the firm is a married woman alter the effect of such renewal.*

* See to same effect *Beardsley v. Hall*, 36 Conn. 270; S. C., 4 Am. Rep. 74.

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ON rule to show cause. The opinion states the case.

Winfield, for defendants.

J. F. McGee, for plaintiffs.

The opinion of the court was delivered by

BEASLEY, C. J. The note in suit was drawn by a firm, one of the members of which was a married woman. More than six years having elapsed after the maturity of the instrument, and before the bringing of the action, the bar of the statute of limitations was attempted to be removed, by the proof of payment of interest before the expiration of the six years, such payment being made by a single member of the firm, and after the dissolution of the firm. The first legal problem presented by the case, therefore, is whether, under the circumstances stated, a partner can, by his separate act, keep alive this obligation of the copartnership after it has been dissolved.

The principal case applicable to this subject in general is that of *Whitcomb v. Whiting*, decided by Lord MANSFIELD, and reported in Douglas, p. 652. The precise point presented was this: the suit was on a joint and several promissory note, made by four persons, against which the statutory time had run out, but it appearing that one of such makers had, within six years, paid the interest and part of the principal, the question arose whether such act took the case out of the statute, with respect to all four drawers. It was held that the action was well brought, Lord MANSFIELD, in assigning the ground of judgment, saying: "Payment by one is payment by all, the one acting, virtually, as the agent for the rest; and, in the same manner, an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due."

There are few cases recorded in the books which have evoked more discussion, and produced greater contrariety of opinion, than this celebrated adjudication. But the rule which it introduced has retained its standing unshaken, in the English jurisprudence, to the present day, and has been adopted by the majority of the judicial tribunals of this country. It has always been regarded as a part of the law of this State. "Now it is well settled," says the opinion read more than twenty years ago, in the Court of Errors and Appeals, in the case of *Disborough v. Bidleman's Heirs*, 1 Zab. 679, "under the statute of 21 Jac. 1, that a partial payment, made by one of two or more makers of a joint and several promissory note, will take the case out of the statute, as regards the other makers, in a separate action against any of the others — *Whitcomb v. Whit-*

ing, etc.; a doctrine which has been frequently recognized as settled law in this State. Payment by one is payment for all, the one acting, virtually, as the agent for the rest." I think it unquestionable, that the doctrine thus stated has been received and acted upon for the last thirty or forty years in our legal practice. To this extent, therefore, I must regard the subject under consideration as closed to all discussion.

And this premise thus established seems, inevitably, to rule the point now considered in this case against the contention of the defendants. Granting that a payment made by one of the makers of a joint note, given by several, is, on the ground of an implied agency, the act of all, it seems a necessary consequence, that the fact that such makers were partners when they issued the paper can have no modifying effect. The obvious reason is, that the agency in question arises, not out of the incidents of the copartnership, but from the relations created by the joint indebtedness. If partners have ceased to be such by the act of dissolution, and can no longer bind each other in that capacity, they are still joint debtors, and, from that connection, they are the agents of each other in making payments, and renewing the promise to pay, so as to avoid the effect of the statute of limitations. This is the logical result of the adoption of the principle upon which the decision in *Whitcomb v. Whiting* is founded; and, accordingly, it will be found that such principle is repudiated in all those decisions which hold that one partner, after the dissolution of the copartnership, cannot, in any respect, affect his copartners by a part payment of a joint obligation. To consistently vindicate the theorem that a partner cannot thus extend, with respect to time, the contracts of the expired firm, the establishment of two propositions is absolutely essential: first, that such act does not appertain to the power incident to the settlement of the business of the partnership; and, second, that from the existence of the joint indebtedness, a right does not arise, in either of the joint debtors, to arrest, by his sole act, the running of the statute of limitations. In this State, as has been already shown, the reverse of this latter proposition is settled, and the consequence is, that the doctrine of the defense, on the point now considered, has no foundation in law upon which it can be placed. The defendant, who made the payment in the present instance, was not, on account of his former connection with the other defendants in the firm which had been dissolved, empowered as their agent to stop, as against his associates, the running of the statute; but such payment being made by one of several joint debtors, had such effect by force of the rule of law proceeding from the case of *Whitcomb v. Whiting*. Applying the language of that authority, "payment by him was payment for all," he "acting virtually as agent

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for the rest." And it is in this way that, between copartners, this principle has been applied by the English courts. In that country, it has been several times decided, and is now the unquestioned rule, that this implied agency arises with respect to payments or acknowledgments made by a partner, after the cessation of the partnership, touching antecedent transactions, so as to take them out of the operation of the statute.

Wood v. Braddick, 1 Taunton, 104, was similar, in the feature now under consideration, to the present case. It was an action against partners, who pleaded the statute of limitations, and the bar was adjudged to be removed by an admission contained in a letter written by one member of the firm after its dissolution. This case has been often cited, and seems never to have been questioned by the English courts, and is relied upon as authority by the Chancellor in the case of *Pritchard v. Draper*, 1 Russel & Mylne, 191. This case has, likewise, been expressly adopted, and its doctrine enforced, in Massachusetts. *Cady v. Shepherd*, 11 Pick. 400; *Vinal v. Burrill*, 16 id. 401; *Sigourney v. Drury*, 14 id. 387. The same rule has been recognized in several of the other States; in Connecticut (*Bound v. Lathrop*, 4 Conn. 336); in Maine (*Shepley v. Waterhouse*, 22 Me. 497); in Vermont (*Wheelock v. Doolittle*, 18 Vt. 440). And in North Carolina and Georgia it was explicitly held that the acknowledgment of the debt by one partner, though after the dissolution of the association, will prevent the operation of the statute. *McIntire v. Oliver*, 2 Hawks, 209; *Brewster v. Hardman*, Dudley, 138.

Until quite recently, this was also the settled law of New York. *Smith v. Ludlow*, 6 Johns. 267; *Johnson v. Beardslee*, 15 id. 3; *Patterson v. Choate*, 7 Wend. 441. But the case of *Van Keuren v. Parmelee*, 2 Comst. 523; and *Shoemaker v. Benedict*, 1 Kern. 176, have taken the opposite view, reversing these earlier decisions.

It seems to me that this reversal of a long series of cases, extending over an extended course of years, cannot but be regarded as anomalous. Originally it may not have been of much consequence whether the rule in question was established the one way or the other; and probably not much inconvenience would have resulted if it had then been declared that joint debtors were not so far agents with respect to each other as to be competent to renew the debt to the extent that it was affected by the operation of the statute. But, granting this, it certainly is important that the rule, when once established, should be steadfast. The business of life rapidly accommodates itself to any rule that is judicially promulgated, the reason being that it is confidently believed that such rule will not be arbitrarily changed, and the highly practical maxim, *stare decisis* is a recognition of the palpable injustice of disappointing such legit-

imate expectations. The crisis, therefore, does not often occur which justifies the overthrow, by judicial action, of an inveterate rule of law. After a careful examination of these reversing decisions, I can perceive no reason assigned for the judicial course thus taken, which, in my opinion, places it in harmony with scientific principles as generally understood. Substantially there is, as it seems to me, but a single ground of decision upon which these cases rest; and that is, that it is inconsistent with correct theory to infer from the fact of the joint obligation and the unity of interest, the agency to renew the contract as against the force of the statute. Such a proposition is incapable of demonstration. A. and B. draw a note; A. pays the interest upon it for six years; each act of payment is such an admission of the existing legal obligation as to justify clearly the inference that a renewed promise is made by A. to pay the debt, so as to postpone the period when an action upon it will be barred by the statute. Thus far the law is not, and never has been disputed. But, in *Whitcomb v. Whiting*, it was held that, in making these payments of the joint debt, it must be esteemed an inference of the law that A. acted for B., as well as for himself. Now here the whole question is, whether it is to be presumed that the payments were made at the request or by the authority of B.; because, if this was so, then, most certainly, the existence of the debt was so recognized by B., that the new promise, by implication, to pay it, follows as a matter of course. Now, why not infer under these circumstances the authority to pay? B. is liable for the money; it is his duty to pay it; the payment is for his benefit; and when A. has paid it, the law holds B. to a contribution, so that A. can sue him for so much money paid and laid out for him at his request. There can be no doubt that this inference is eminently consistent with the ordinary course of affairs, for it is certain that, in the vast majority of instances, these payments made by one of the joint debtors is so made with the knowledge and at the instance of the other. It is not necessary to assert that this is the better of the two adverse theories on this subject, it being quite sufficient to show that the rule originally established had some basis in principle to rest upon. In the cases in New York it is argued, with force, that the juncture in question affords no ground for this inference of an agency. The case there was this: that, for near half a century, the rule of the English law was settled upon this subject; that, for nearly the same period of time, it was equally settled in the State of New York; that the rule was sanctioned by a long line of both English and American jurists, of the very highest eminence; that there was nothing to show that this rule had resulted in evil, or had been productive even of inconvenience. Under

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such circumstances, notwithstanding the great respect which I entertain for the eminent tribunal whose two decisions have revolutionized, in the State of New York, this branch of the law, I cannot yield my assent to the propriety of such course. In my opinion, the introduction of the principle of judicial action exemplified in these cases would do much to shake the confidence now felt in the stability of legal rules. It is enough for me to know that the rule in question has, for many years, been regarded by my predecessors as the settled law of this State; that it rests upon respectable grounds, to say the least of it, and that, in its operation upon the affairs of business, it has not been attended with any serious inconveniences. Under such conditions, I think the rule cannot be abolished, even though it should seem that it is not entirely reconcilable with the highest ideal of a perfect theory of the legal subject to which it appertains.

In the second branch of the argument, urged in behalf of the defense, I can perceive nothing that requires elucidation. The fact that one of the defendants is a married woman cannot affect the result. She was competent to make the original contract, and was equally competent to renew it. The law, under proper circumstances, will as readily raise a promise against her as it would if she were discovered. So she can act through the medium of an agency. If the previous reasoning is correct, and a renewal of the original assumption was properly implied from the facts in proof against the rest of the defendants, it must, on the same grounds, be implied against this married defendant.

Let the rule be discharged.

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(9 Vroom, 176.)

Larceny—fraudulent taking.

The prisoner ran away with a horse and carriage, without the owner's knowledge or consent, and with no intention of returning them, and afterward abandoned them in the street. *Held*, larceny.

THE Court of General Sessions of the Peace of the county of Mercer, request the advisory opinion of the Supreme Court in the above cause. They find certain facts upon an allegation of crime tried before them, by the prisoner's consent, under the statute, without a jury, and

adjudge the defendant guilty. Upon motion for a new trial, a rule to show cause was granted and the finding sent to this court. The material facts appear in the opinion.

M. Beasley, Jr., for State.

W. F. Johnson, for defendant.

SCUDDER, J. The defendant, who is quite young, in passing along the street near midnight, February 22d, 1875, saw the carriage of Dr. Charles Hodge, junior, standing in front of his residence. He and a companion took the horse and carriage, drove rapidly away in a reckless manner, and about 10 o'clock the next day the horse and carriage were found abandoned several miles away from where they were taken. They were found in the road, the horse much exhausted from driving and want of food. The prisoner did not return the horse and wagon to the owner, or make any effort to do so, or apprise any one where they could be found, or to whom or where they belonged. He did not even put them in some secure place, where the owner might find them. These acts were perfectly consistent with an intent originally to deprive the owner of his property; but finding them a dangerous possession, and becoming frightened, they were abandoned when detection became imminent. His conduct was utterly reckless of the rights of the owner; but was it criminal, and does it sustain the finding that he was guilty of larceny?

The principles which must determine this case are fully discussed by Chief Justice GREEN in *State v. South*, 4 Dutch. 28, and, as is his wont, he leaves but little to find on the subject for those who come after him as gleaners.

The question in that case was, whether the fraudulently depriving the owner of the temporary use of a chattel can constitute larceny at the common law; whether the felonious intent, or *animus furandi*, may consist with an intention to return the chattel to the owner. It was there held, that if the property were taken with the intention of only using it temporarily and then returning it to the owner, it is not larceny; but if it appeared that the goods were taken with the intention of permanently depriving the owner of his property, then it is larceny; and that this intent is a fact to be decided by the jury from the evidence.

The question, therefore, in this case is, whether there are facts shown from which a jury should infer that it was the intention of the defendant to permanently deprive the owner of his property.

A man's intention must be judged by his acts and expressions; and it

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is manifested by circumstances that vary with almost every case that is presented for consideration. The general rule to determine what he intends by his acts is, that a man intends that consequence which he contemplates, and which he expects to result from his act, and he therefore must be taken to intend every consequence which is the natural and immediate result of any act which he voluntarily does. 2 Stark. Ev. 573.

When, by the voluntary act of this defendant, the horse and carriage were loosed from their hitching place in front of their owner's door, and driven away in the night, and after many miles and hours of reckless driving were left in the public road, did the taker contemplate, and was the natural and immediate consequence which he should be presumed to contemplate at the time of taking, that the owner would be permanently deprived of his property? It is not his intention at the time of the abandonment, but the purpose at the time of taking, that we must seek; for an article may be taken with intent to steal and afterward abandoned on pursuit, or from a mere change of purpose, yet the taking will be larceny.

I think that fraudulently taking the personal property of another without his consent, and with no intent, at the time of taking, to return the same, is evidence of such intent to deprive the owner of his property; that a jury not only could, but should find the taker guilty of larceny.

It is not a mere temporary taking which may consist with an intent to return, but a taking what may result by a natural and immediate consequence in the entire loss and deprivation of the property to the owner. An abandonment to mere chance is such reckless exposure to loss that the guilty party should be held criminally responsible for an intent to lose.

If a person take another's watch from his table, with no intent to return it, but for the purpose of timing his walk to the station to catch a train, and when he reaches there leaves it on the seat, for the owner to get it back or lose it, as may happen. If a man take another's axe with no intent to return it, but to take it to the woods to cut trees, and after he has finished his work cast it in the bushes, at the owner's risk of losing it, such reckless conduct would be accounted criminal. It is true that the probability of finding the horse and wagon may be greater than that of recovering the watch or axe, because they are larger and more difficult to conceal, but the intent is not to be measured by such nice probabilities; rather by the broader probability that the owner may lose his property, because the taker has no purpose of ever returning it to him.

The cases that are most frequently cited in opposition to this view are *Phillips & Strong's case*, 2 East's P. C., ch. 16, 98. Here the horses were

taken to and in a journey and left at an inn. The jury found the prisoners guilty, but added they were of opinion that the persons meant merely to ride them to Leedsdale and leave them there, and that they had no intention to return them, or to make any further use of them. The court said that if the jury had found the prisoners guilty generally upon the evidence, the verdict could not have been questioned, but as they found especially from the facts that there was no intention in the prisoners to change the property, or make it their own, but only to use it for a special purpose to save their labor in traveling, it was only a trespass and not felony. The express intention found was inconsistent with the general finding. Yet the facts were sufficient to sustain a general verdict of guilty of larceny. The court were divided on the effect of this special finding.

In *Rex v. Crump*, 1 Carr. & P. 658 (11 E. C. L.), the prisoner took a horse with other property, and after going some distance turned the horse loose, proceeded on foot and attempted to dispose of the other property. It was left to the jury to say whether he intended to steal the horse or to use him to carry off the plunder. He was found not guilty of stealing the horse and guilty of stealing the other property. It was said that he distinctly manifested his purpose of converting the other articles to his own use by offering them for sale. It is odd that such a nice distinction and division of intention should be made dependent on the kind of property taken at the same time. Lord DENMAN said, in *Regina v. Holloway*, that if a man took another's horse without leave, intending to ride it at every fair in England (which would take him a year), and then return the horse at the end of that time, it would not be larceny. This was the statement of an extreme case by way of illustrating a principle, and there was here a purpose to return to the owner.

In *Rex v. Cabbage*, R. & R. C. C. 292, the prisoner went to a stable door, forced it open, took the horse out, went some distance along the road until he came to a coal pit, and there backed the horse in the pit, where he was found dead. It was held that it was not essential to constitute the offense of larceny that the taking should be *lucri causa*, that taking fraudulently, with an intent wholly to deprive the owner of the property was sufficient, and the prisoner was convicted.

These cases will be sufficient to illustrate the principles and the distinctions upon which this case will be decided.

It is conceded that the law is settled with us according to the rule of the common law, and the approved definition of larceny, given by Mr. East in East's P. C., ch. 16, § 1, where it is said to be "the wrongful or fraudulent taking and carrying away, by any person, of the mere per-

sonal goods of another from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." And it has been uniformly held that the felonious intent must manifest a purpose to deprive the owner wholly of his property.

The definition given by EYRE, B., *Pear's case*, East's P. C., ch. 16, § 12, that larceny is the wrongful taking of goods with intent to spoil the owner of them *causa lucri*, would seem to be too narrow, because the law considers not only and always the effect of gain to the taker as an essential to the crime, but also the deprivation to the owner of his property. Either will be sufficient in the evidence of larceny. 2 Arch. Cr. Pr. & Pl. 389-392.

It is interesting, however, to notice the broader definition of theft or larceny in the civil law, and how nearly it accords with the efforts to reach, by criminal punishment, the reckless temporary use and abuse of the property of others by taking from an owner who does not consent. Just. Ins. Lib. 4, tit. 1, thus defines it: "*Furtum est contractatio fraudulosa, lucri faciendi gratia, vel ipsius rei, vel etiam usus ejus, possessionisve; quod lege naturali prohibetur est admittere.*" Thus not only the fraudulent taking of the thing itself, but the using and possessing any thing by fraud for the sake of gain, was theft by the civil law. But this does not agree with the law as settled in our common-law courts, and the taker must intend to deprive the owner wholly of his property.

This is the conclusion to which Chief Justice GREEN came, as it appears reluctantly, in the case of *The State v. South*, and against which Judge SHARSWOOD protests in the note to *Queen v. Holloway*, 1 Den. C. C. 376, reasoning strongly for an extension of the definition of larceny.

Doubtless the severe punishment of felony under the old English law has led to this more restricted construction, but the lighter penalties which now are inflicted would seem to make an extension of the crime of theft or larceny desirable, even to the limits of the civil law definition.

There has been no case decided in this State, that has held that, where the taker had no intention to return the goods, the taking was merely temporary. Nor is there any thing that should control the action of a jury, or the court acting as such under the statute, when they find that the party having no such intent is guilty of larceny. It would be a most dangerous doctrine to hold that a mere stranger may thus use and abuse the property of another, and leave him the bare chance of recovering it by careful pursuit and search, without any criminal responsibility in the taker.

The Court of Quarter Sessions are advised that the verdict is right, and should not be disturbed.

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MARTIN V. THE FRANKLIN FIRE INSURANCE COMPANY.

(9 Vroom, 140.)

Insurance — action on policy — who may bring — appointment of payment.

On a policy of insurance against loss by fire, under seal, issued to the owner of the property, in which the insurer covenants to make good unto the insured, his executors, administrators, or assigns, all such damage or loss as might happen, etc., the owner may sue in his own name, although it may be written on the face of the policy, "Loss, if any, payable to A. B., as mortgagee."

The direction on the policy to pay to the mortgagee is not an assignment of the policy. Its legal effect is that of a direction, in advance, as to the mode of payment, which, when made, is performance in the manner agreed to by the insured.

Under such a direction, if assented to by the insurer, the person in whose favor the appointment is made acquires equitable rights, which the insurer is bound to regard, but the contract with the insured is not thereby merged or extinguished.

In an action on such a policy, in the name of the insured, if the insurer has paid the insurance money to the mortgagee, he may plead such payment as performance, and the rights of the mortgagee can be protected, and the insurer obtain indemnity against a subsequent suit by the mortgagee by the payment of the money into court.

ACTION on a policy of fire insurance. The opinion states the case.

J. B. Vredenburgk, for plaintiff.

Kingman, for defendants.

DEPUT, J. This action was brought on a policy of insurance against loss by fire, issued by the defendants to the plaintiff on premises in Jersey City. The policy is under seal, and is dated on the 27th of April, 1870. The loss occurred in September of the same year.

The ground of demurrer is, that the action was improperly brought in the plaintiff's name. To sustain the demurrer, the defendants rely on an averment in the declaration, that "on the 30th day of May, 1870, by a certain memorandum written on the face of said policy of insurance, and subscribed by the said defendants, it was agreed as follows, to wit: Loss, if any, payable to Garret G. Vreeland, as mortgagee." On this averment, the contention is that the action is maintainable only in the name of Vreeland.

In *Hilliard v. The Mutual Benefit Ins. Co.*, 6 Vroom. 415, this court held, that where a person takes a policy on his life, payable at his death to a third person, if it be in the form of a simple contract, action may be brought on it by the party having the beneficial interest. This case was affirmed on error, 8 Vroom, 444; S. C., 18 Am. Rep. 741. Indeed, it may be stated, as a general rule, that on a life policy where the money

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to become due under it is payable to certain persons named as beneficiaries, the policy and money payable thereunder belong, the moment it is issued, to the persons designated, and they are the proper parties to receipt for the money, and sue on the policy. The legal representatives of the insured have no claim upon the money, and cannot maintain an action therefor if it be expressed to be for the benefit of some one else. *Bliss on Life Ins.*, § 317.

This rule is founded on the fact that a life policy is a wager policy. It is a mere contract to pay the stipulated sum upon the death of a named individual, in consideration of the payment of the premiums reserved during his life. An interest in the life insured is not necessary to give validity to the contract. *Trenton Mutual Life Ins. Co. v. Johnson*, 4 Zabr. 576; *Dalby v. The India, etc., Co.*, 15 C. B. 365. The rights and obligations of the parties, therefore, are determined by the form of the contract. If, by the terms of the policy, the money is payable to a third person, such person has the sole and exclusive interest in the insurance.

A contract of insurance against loss by fire is a different thing. It is a contract of indemnity, which requires an insurable interest in the property to give it validity. The owner who obtains the insurance, pays the premium, and takes a policy in his own name, is the party insured, although, in case of a loss, payment is to be made to a third person. *Stanford v. The Mechanics' Ins. Co.*, 12 Cush. 541. If the person to whom the loss is made payable be a mortgagee, the contract, nevertheless, is with the owner, for the insurance of his property, and not with the mortgagee, for the insurance of his interest. *Grosvenor v. The Atlantic Ins. Co.*, 17 N. Y. 391; *Bidwell v. The N. W. Ins. Co.*, 19 id. 179. To treat the policy of insurance, under such circumstances, as a contract exclusively with the mortgagee, would lead to results in plain violation of the intention of the parties. On such a contract, the measure of liability is the payment of the mortgage money, and on payment thereof the insurer will be remitted to the mortgagee's lien on the mortgaged premises for indemnity. *Insurance Co. v. Woodruff*, 2 Dutch. 541.

In the present case, in the body of the policy, the defendants expressly covenant, in consideration of the premium paid, to make good and satisfy unto the insured, his executors, administrators or assigns, all such damage or loss as might happen to the property insured, within the period for which the policy was issued. This is the contract between the parties. The direction to pay the sum in which the insurance was effected to the mortgagee, in case of a loss, is collateral to the principal contract, and is not an assignment of the policy.

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The legal effect of such a clause in favor of a third person in a policy, in terms between the insurer and the owner, is that of a direction in advance as to the mode of payment, which, when made, is performance of the contract in the manner assented to by the insured, and discharges the obligation *pro tanto*. This view of the nature of a clause of this kind in a policy, is expressed by SHAW, C. J., in *Fogg v. Middlesex Ins. Co.*, 10 Cush. 346; by BIGELOW, J., in *Hale v. Mechanics' Ins. Co.*, 6 Gray, 172; by DEWEY, J., in *Loring v. The Manufacturers' Ins. Co.*, 8 id. 29 by AMES, J., in *Turner v. Quincy Ins. Co.*, 109 Mass. 573; and by HARRIS, J., in *Grosvenor v. Atlantic Mutual*, 17 N. Y. 394.

Under such a direction, if assented to by the insurer, the person in whose favor the appointment is made acquires equitable rights, which the insurer is bound to regard, but the contract with the insured is not thereby merged or extinguished. If the appointment be in favor of a mortgagee, it will not operate *pro tanto* as an extinguishment of the mortgaged debt. The mortgagee may be content with the security of the remaining property included in his mortgage, or with his remedy on the bond. The interest of the owner in the property, and in having the mortgage debt satisfied, remains, notwithstanding the direction in the policy, to pay the insurance money to the mortgagee in case of a loss. The interest so remaining in the owner is an insurable interest, for the protection of which he may resort to his contract with the insurer.

It has accordingly been held, that on a policy in which the insurer "caused C. & L., for the owners, payable to C. & L.," to be insured, an action might be maintained in the name of the owners, with the consent of C. & L. (*Farrow v. The Commonwealth Ins. Co.*, 18 Pick. 53), and that the owner who insures his property by a policy payable to a mortgagee in case of loss, might maintain an action on the policy in his own name, by the consent of the mortgagee, and that such consent may be shown at the trial, or even before judgment entered. *Jackson v. Farmer Ins. Co.*, 5 Gray, 52; *Turner v. Quincy Ins. Co.*, 109 Mass. 568.

In my judgment, a broader principle even may be adopted than was recognized in these cases, and the rule be affirmed on sound legal principles, that an action may be maintained in the name of the party with whom the contract was made, with or without the consent of the person in whose favor the appointment is made, in all cases where an insurable interest remains in such party. In *Davis v. Boardman*, 12 Mass. 80, the policy stated that the plaintiff, D., "or as agent," made insurance, etc., it appearing that the insurance was made for the benefit of the plaintiff and another joint owner, and he was allowed to recover the whole loss in his own name, for the use of himself and the other joint owner. In

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Ward v. Wood, 18 Mass. 589, the declaration alleged that the policy was made to the plaintiff, as well for C. S. as himself, in certain proportions. It was objected, that C. S. should have joined in the action, and was held, by the court, that "it was in conformity with the contract, that the plaintiff should maintain the action in his own name," and that the action was well brought without joining C. S. In *Rider v. Ocean Ins. Co.*, 20 Pick. 259, the policy on a vessel was issued to the plaintiff, for whom it might concern, loss payable to a third person, who was mortgagee; the property was the property of the plaintiff and two others. An action in the name of the plaintiff was held to be correctly brought, the court saying that "the suit would have been properly commenced in his own name, even if he had never been interested in the vessel; but, in such case, he should have averred and proved for whose account the policy was made, and in whom the interest at the time of the loss really was." In *Ketcham v. Protection Ins. Co.*, cited in Digest of Insurance Cases, from 1 Allen (N. Bruns.), 136, the insurers consented, by an indorsement on the policy, that the loss should be payable to W., and it was held that such indorsement did not preclude the assured from maintaining an action in his own name. In a mutual company, on a policy "Loss payable to," etc., the action must be brought in the name of the party to the policy, who gives the premium note, and thereby becomes a member of the company. *Nevins v. Rockingham Ins. Co.*, 5 Fost. (N. H.) 22; *Tolson v. Belknap Co. Ins. Co.*, 10 id. 231.

I am aware that there are dicta and cases to the contrary effect, but they will be found, in the main, to be cases where the insured had parted with his insurable interest, or made a regular assignment of the policy, which had been ratified by the insurer, under its charter or by-laws, or the question has been as to the right of the person to whom the insurance money is appointed to be paid to sue in his own name.

Where the party with whom the contract of insurance is expressly made has still an insurable interest to be protected by the policy, and has not assigned it by a legal assignment, it is consistent with settled legal principles to give him a right of action on the policy in his own name. In such an action, if the insurance money be wholly unpaid, the recovery will be for the entire interest in the policy, without regard to the mortgage. No injury will result from such a procedure to any of the parties concerned. If the insurer has paid the money to the mortgagee, he may plead the payment as performance. The breach assigned in the declaration, that the defendant "has not paid or made good the plaintiff's loss, or any part thereof, either to the plaintiff or to the said Garret Vreeland," tenders such an issue. The rights of the mortgagees

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can also be protected, by payment of the money into court, and the insurer may obtain indemnity against any subsequent suit by the mortgagees, by the action of the court into which the money is paid. If actions be pending at the same time by the owner and the mortgagee, the court, under its equitable powers, can so control the litigation that no injustice will be done.

The demurrer should be overruled.

BOYD V. KENNEDY.

(9 Vroom, 146.)

Bonds — stolen, action on, by bona fide purchaser.

County bonds lawfully issued, with a blank left for the name of the payee, were stolen. Held, that they were valid and negotiable, and that a *bona fide* purchaser could hold them against the true owner.

ON rule to show cause why a new trial should not be granted. Boyd sued Kennedy in replevin, for the possession of a bond made by the board of chosen freeholders of the county of Hudson, bearing date September 1st, 1865, issued under an act of the legislature, approved February 28th, 1865. (Acts of 1875, p. 163.)

In the bond it is recited that the board of chosen freeholders of the county of Hudson, for and in behalf of the inhabitants of the said county, acknowledge themselves indebted, for value received, to . . . or . . . in the sum of one thousand dollars, to be paid to the said . . . or . . . at the county collector's office, on September 1st, 1885, with interest thereon at seven per cent, payable semi-annually, on surrender of the coupons annexed. The interest coupons annexed are payable semi-annually to the holders thereof, on, etc.

The act authorized the issue of bonds for an amount sufficient to pay a bounty of \$400 to each volunteer, substitute, or drafted man to fill the quota of the county. It prescribed that the bonds should be in sums of \$500 and \$1,000, payable at a period not less than twenty years, with coupons attached, for interest semi-annually, and might be payable to bearer or order. It further provided that the bonds might, in the discretion of the board, be used or applied to indemnify any city or township

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in the county which had paid or secured bounties to its volunteers, substitutes or drafted men.

The bond in question was allotted to the township of South Bergen, and was sold and delivered by the freeholders of that township to the plaintiff, in 1865. The plaintiff deposited it in the Third National Bank of Baltimore, from which it was feloniously stolen, in 1872. It subsequently came to the possession of one Columbaur, by whom it was sold and delivered to Loder, who sold and delivered it to Kennedy, the defendant. The blanks left in the printed bond were not filled up when produced at the trial.

The cause was tried by the court, a jury being waived, and resulted in a finding for the defendant, on which this rule to show cause was granted.

Dixon, for the rule.

Leon Abbett, contra.

DEPUE, J. Coupon bonds of corporation issued under legislative authority, and intended as the means of raising money on a credit, if they contain words of a negotiability, are negotiable in the same way as promissory notes. If payable to bearer, they are negotiable by delivery. *Morris Canal v. Fisher*, 1 Stockt. 667; *Morris Canal v. Lewis*, 1 Beas. 323. The title of the purchaser of such a security for a valuable consideration has all the qualities of the title of the holder of ordinary commercial paper, under the same circumstances. It will not be defeated by the want of title of the vendor from whom he purchases, unless actual fraud be shown in the party making the purchase. *Mercer Co. v. Hackett*, 1 Wall. 83; *Murray v. Lardner*, 2 id. 110; *Welch v. Sage*, 47 N. Y. 143; *Seybel v. National Currency Bank*, 54 id. 288; *Dutchess Co. Ins. Co. v. Hachfield*, 2 N. Y. Sup. 158; *Morris Canal v. Lewis*, *supra*. The numerous cases on this subject are cited in 1 Dillon on Mun. Corp., § 405, *n.*, and in 3 Kent (12th ed.) 89, *n.*

The contention in behalf of the plaintiff was, that this bond having been issued with a blank for the name of the payee did not possess the quality of negotiability which attaches to a completed instrument. This question is presented under circumstances most favorable for the defendant. The obligors are not before the court setting up the incompleteness of the bond in avoidance of its obligation. Both parties make title on the assumption that the bond is valid. Neither claims under a delivery immediately by the commissioners, who alone were authorized to make and issue the bonds.

In *Texira v. Evans*, cited in *Master v. Miller*, 1 Anstruther, 228, the defendant, wanting to raise £400, or so much thereof as his credit would procure him, executed a bond with blanks for the name of the payee, and the sum, and gave it to his agent to raise the money. The plaintiff lent £200 on it, and the agent filled up the blanks with that sum, and the plaintiff's name, and delivered the bond to him. On *non est factum* pleaded, Lord MANSFIELD held it to be a good deed. This case was overruled in *Hibblewhite v. McMorine*, 6 M. & W. 200, where it was held, under a statute requiring the conveyance of shares of a joint-stock corporation to be by deed, that an instrument of transfer under seal, with a blank for the name of the purchaser, was void. On the authority of the latter case, the law may now be considered as settled, in England, that a bond executed with a blank for the name of the payee is void. *Enthoven v. Hoyle*, 13 C. B. 373; *Squire v. Witton*, 1 H. of L. Cases, 338. A different rule prevails there, in respect of ordinary commercial paper, and it has been held that a bill of exchange drawn with a blank for the name of payee may be filled up by any *bona fide* holder with his own name, and will bind the drawer. *Crutchley v. Clarence*, 2 M. & S. 90.

The reason assigned in *Hibblewhite v. McMorine* for overruling *Texira v. Evans*, and re-establishing the technical rule of the common law—that the authority of an agent to fill a blank in an instrument under seal, and thus make it the valid deed of his principal, must be conferred by deed—was that the contrary doctrine would make a deed transferable and negotiable like a bill of exchange or exchequer bill, which the law did not permit. This decision was prompted by consideration of a public policy, which, it was supposed, forbid that obligations under seal should be put on the same footing as ordinary commercial paper, in their negotiability.

A different opinion of the requirements of the public policy is entertained by the courts of this State, and generally throughout the United States. Corporations have been authorized to issue bonds for large amounts, wheron to procure loans, and provide funds for present use, to be repaid on long credits. To accomplish this purpose, it is necessary to put these bonds on the market. A ready negotiation of such securities is needed to promote their circulation, and thereby give them increased value, for the purpose of the investment of money. Consequently, such securities, by common usage, sanctioned by the courts, have obtained the qualities and attributes of negotiable paper, in respect to their transfer. Under such circumstances, the reason on which *Hibblewhite v. McMorine* is based is not only inapplicable, but is furthermore inconsistent with the qualities with which such paper has become invested.

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In *White v. The Vt. & Mass. R. R. Co.*, 21 How. 575, the Supreme Court of the United States decided that a bond issued by a railroad corporation, payable in blank — no payee being inserted — and sold in the market, might be filled up by a holder, to whom it had passed, through several intervening holders, by inserting his own name, and a suit be maintained by him on it. In *Brainerd v. The N. Y. & H. R. R. Co.*, 25 N. Y. 496, a bond issued by a corporation to A. B. or his assigns, was delivered by the payee with an assignment in blank. It was held that a blank assignment, signed by the payee, was a sufficient transfer, and that the plaintiff was entitled to insert his own name in the blank. In *Hubbard v. N. Y. & H. R. R. Co.*, 36 Barb. 286, in an action on a bond payable to . . . or his assigns, it was held that any lawful holder, by transfer, or delivery, might fill in his name as payee, and bring an action on it. In *Dutchess County Ins. Co. v. Hackfield*, 4 N. Y. Sup. 158, the controversy was between the rightful owner of a bond, payable to . . . or his executors, administrators or assigns, from whom it had been feloniously stolen, and the subsequent purchaser. It was held that the instrument, in that form, was negotiable paper, and that a subsequent *bona fide* purchase would give good title against the former owner.

The principle adopted in these cases inevitably results from the doctrine that such securities, for the purpose of negotiation, have the attributes of commercial paper, and is necessary to carry into effect the intent of the obligors.

In the present instance, the sum for which the issue was authorized was quite large. It was divided up into lesser amounts, to promote the negotiation of the bonds which were made payable at a distant period of time. It must have been contemplated that these bonds might pass through many hands before maturity. By issuing them in blank, it was plainly the intent of the obligors to make themselves the debtors to any person to whose hands they might come, and it may be fairly presumed that they consented that any *bona fide* holder might perfect his contract by inserting his name in the space left for that purpose. *Chapin v. V. & M. R. R. Co.*, 8 Gray, 575. The authority to complete the instrument and make it what it was intended to be — a valid security — is implied from the act of the obligors in putting the instrument in circulation. *Ledwich v. McKim*, 53 N. Y. 307.

The court found that both Kennedy and Loder were *bona fide* holders. This finding is fully justified by the testimony as to Loder. He bought the bond in the usual course of business, for a valuable consideration. There is nothing in the proof to impeach the *bona fides* of the transac-

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tion by which he acquired it. The title he acquired was transmitted to Kennedy.

The result below was right, and the rule to show cause should be discharged.

THE STATE, NEW BRUNSWICK RUBBER COMPANY, prosecutors, v.
THE COMMISSIONERS OF STREETS AND SEWERS.

(9 Vroom, 190.)

Assessments for local improvements — how apportioned. — estoppel.

A statute authorized commissioners to assess the cost of a sewer upon lands benefited thereby in such proportion as they should think just and equitable. *Held*, that no valid assessment could be made under the statute, as it failed to determine the mode of distributing the burden.

The report of commissioners must show on its face a compliance with all legal rules, the observance of which is necessary to constitute a valid assessment.

An assessment for a sewer upon designated lands, in proportion to area or frontage, is not, as a method of assessment, supportable.

The fact that a land-owner has connected his lands assessed with the sewer does not estop him from questioning the legality of the assessment.

ON *certiorari* to remove the assessment for construction of sewers in the city of New Brunswick.

Abel I. Smith and I. W. Scudder, for plaintiffs.

A. V. Schenck, for defendants.

KNAPP, J. This writ, with twenty-one others issued out of this court, at the instance of eighty-three prosecutors, brings up the assessment of the "commissioners of streets and sewers in the city of New Brunswick," made against the lands of the prosecutors and others for the cost of certain sewers in that part of the territorial limits of the city of New Brunswick, designated by the commissioners as "Sewer District No. 1."

By agreement of the parties, the return to one of said writs is to be taken as the return to all. The testimony taken in one case to be used in all, and the cases to be heard together. The same questions are involved in each case; they were presented to the court in one argument, and the decision in one case will control the others. The reasons, seventeen in number, assail the validity and binding force of the act authorizing the assessment, the principles upon which the assessment was made as re-

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ported by the commissioners, and the legality of the proceedings of the commissioners in laying the assessment.

The act of March 28d, 1871 (Pamph. Laws, 795), appoints certain persons to be called "Commissioners of Streets and Sewers in the city of New Brunswick," and empowers them to construct sewers, culverts and drains within the limits of said city, conformably to a general plan to be adopted by the said commissioners. And by the seventeenth section of that act it is provided, that upon the completion of any sewer, or the section of a sewer or drain, and other works connected therewith, the said commissioners "shall ascertain the whole cost thereof, and the size of all lots or separate parcels of ground drained thereby, and shall fix the amount to be paid for each in such proportions as may, in the judgment of said commissioners be just and equitable." By the third section of the supplement to the above act, approved March 25th, 1874 (Pamph. Laws, 479), one-fourth of the whole cost of such sewer, or section of a sewer, is directed to be paid by the city of New Brunswick, and the remaining three-fourths is to be assessed in the manner provided for in the original act.

The commissioners, in the summer of 1871, entered upon the construction of sewers in "District No. 1" in said city, and contracts were awarded for the building of the same in three separate sections or divisions. On the 30th of April, 1874, the assessment for the cost of the sewers in the whole district was adopted, and notice of the assessment, as required by the act, was published on the 5th of May following. By that notice it appears that the aggregate assessment for the sewers in the district amounted to the sum of \$298,141.03, one-quarter of which sum was directed by the commissioners to be paid by the city, and the remaining three-quarters was assessed upon the lots abutting on the streets through which the sewers were made, including the property belonging to the prosecutors. There was also assessed upon certain of the lots, the sum of \$—, for lateral sewers. A copy of the newspaper in which the notice was published, made an exhibit in the cause, furnishes the only evidence before the court of the several amounts assessed, and what lots or parcels of land are assessed for the improvement.

The power to tax, for the expense of local public improvements, lands peculiarly benefited by such improvements, in proportion to, and to the extent of the benefits received, when properly authorized by legislative enactment, is not drawn in question in these cases. The claim of the prosecutors is, that there is no law authorizing such tax in this case; that the act under which the commissioners have sought to impose this special assessment is invalid. If the authority exists in the commission to levy

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this special tax, it must, so far as respects the lots drained, be derived solely from the provisions of the seventeenth section of the act of 1871, above cited. It must be found in the terms of that section, or arise out of them by fair and reasonable implication. It is not sufficient that the legislative act merely declares that the cost, or a part of the cost of the improvement, shall be assessed upon the lots drained by the sewers to be built. It must, as well, establish some rule—some definite scheme—within constitutional limits, for the apportionment of the tax upon the lands on which such special burthen is imposed. An act of the legislature, directing a tax for a local improvement to be imposed upon particular lands, to be legal or effectual, must consist of something more than a mere authorization to assess a sum of money, the cost of a local improvement upon the designated property—the act must determine the mode of distributing the burden; the property out of which the tax is to be made must be designated, and some certain standard of assessments established; it cannot properly be left by the legislature to the discretion of others to fix the method. This is substantially what was said by this court in *State, Gaines, pros., v. Hudson County Avenue Commissioners*, 8 Vroom, 12. To a like effect is the language of the Court of Errors in *State, Agens, v. City of Newark*, id. 415; S. C., 18 Am. Rep. 729; the Chief Justice, in delivering the opinion of the court in that case, says: "The only safe rule is, that the statute authorizing the assessments shall itself fix either in terms or by fair implication the legal standard to which such assessments must be made to conform. In no other way can property be adequately protected." The assessment is, by the act, directed as to three-fourths of the cost of the improvement, to be made upon the lands drained by the sewers, and the division of the burthen amongst the various lots and parcels answering to the designation, is left to the unlimited discretion of the commissioners, such distribution is not proportioned to, nor limited in extent to the benefits conferred; it is not regulated by any defined rule or standard of assessment; on the contrary, the act, if valid, has reposed in these commissioners authority to tax, specially designated property, for a large part of the cost of a public improvement, untrammelled by rule or principle, in the exercise of which authority they are permitted to divide this burthen, and impose it on the specified lands, in such manner as they, in their judgment, may think just and equitable. In *State v. Mayor, etc., of Paterson*, 8 Vroom, 412, an assessment, certified to have been equitably made, was set aside as governed by no rule. It is not perceived how a legislative enactment, which provides no rule or standard for making an assessment for a public work, can have higher claim to validity. The want of proper limitation in this act, upon the

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exercise of the power to assess, cannot be supplied by intendment, as was done in the case of the village of Passaic charter (*Passaic v. State*, 8 Vroom, 588); there is nothing in the act to support such an intendment; construction cannot aid it; nothing short of legislation can cure a defect so radical. Were it within the range of judicial power to aid by construction the act under which the commissioners proceeded, the assessment, as the return to the writ shows, is equally and fatally defective. However valid the law under which an assessment is made may be, the assessment must show on its face the principles on which it was made, and such principles must be accordant with legal requirements. The assessment, as returned, shows the amount assessed upon certain designated lots, and states, in the language of the act, that such amount was fixed and ascertained by the commissioners, as in their judgment, just and equitable; it does not affirmatively appear by the assessment as returned, that tax was confined to, or even imposed upon, the property drained by the sewers, no allusion is made to benefits conferred by the improvement upon the property assessed, nor is any intimation given that the assessment was distributed with any reference to benefit; so far as the return discloses, the assessments are purely arbitrary, and insupportable under the rules as settled in the courts of this State.

If resort be had to the testimony taken in the cases, it would seem that the scheme of assessment as presented by the engineer, and accepted and adopted as the return shows by the commissioners, assessed upon the property six cents and one mill for each square foot of surface of so much of each lot abutting on any street in which a sewer is built, as lies within 50 feet of the street line, and for the remainder of such lot, three cents and one mill per square foot. Whether or not this is by reason of the especial benefit to such property, or is in proportion to the benefits received by the lands assessed, and not in excess of such especial benefits, does not appear. It may, possibly, meet all these conditions, but the judgment of the commissioners as to whether it does or not is absent, the testimony does not show it, and there is no presumption of law or fact that it is so.

An assessment for a street or sewer so apportioned on the lands that it happens to be coincident with the proportion of area of those lands may, like an assessment on frontage, be according to the rule of benefits as established by law, and if commissioners, acting under that rule, so find and assess property, that is, if they, in assessing property specially benefited, under the proper rule for such assessments that the area or frontage of the assessable property corresponds with the benefits to such property, it would be a proper assessment, and sustainable in the absence of evidence

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to show an error in judgment; the mere fact that an assessment laid on property peculiarly benefited in proportion to benefits, and limited thereto, corresponds with area or frontage, will not overturn such assessment.

But area or frontage as a basis of assessment, other than for sidewalks, does not meet the legal rule upon which lands peculiarly benefited can be assessed for local improvements; and so far as appears by the testimony, area was adopted by the commissioners as the measure of the assessment.

It seems to me to be quite clear that the act creating the commission and authorizing the sewers to be built fails to provide, either in terms or by implication, a legal mode for the assessment in question.

That the commissioners, so far as appears by the return to the writs, have proceeded upon no recognised legal rule in making the assessment, nor indeed upon any rule.

And the testimony shows that the assessment, as actually made, left out of view the consideration of benefits, as their guiding rule.

The defendants in *certiorari* insist that, although that part of the act of 1871, under which the commissioners acted in making the assessment, may be within constitutional inhibition, yet the prosecutors having stood by and seen the work of constructing the sewers initiated and proceeded with to completion; part of them having connected with the sewers, and some or one having purchased lands assessed after the assessment laid, and assumed payment of the assessment as part of the consideration are not at liberty to avail themselves of the errors and defects existing, they having, by their acquiescence, waived all defects, whether constitutional or otherwise. That their laches, in applying for and prosecuting these writs, is such that the writs should be dismissed and the court refuse to entertain the cases. A number of authorities are cited in the brief of counsel to support this view.

It may fairly be held that the prosecutors are precluded from alleging any errors in the formal determination of the commissioners to construct the work, or their proceedings preliminary to the construction, or in the construction itself, so far as they were open and unconcealed.

The writs of *certiorari* bring up the assessments laid for paying for this work. The assessment was laid in April, 1874, after most of the connections had been made by the prosecutors with the sewers—the act directing one-fourth of the cost to be placed on the city, was not passed until March, 1874—there seems to have been no unreasonable delay in applying for the writs, and no loss or embarrassment appears to have arisen to the city or the commissioners by reason of such delay as claimed; there seems nothing in the case to evince an intention at any time to ac-

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quiesce in or assent to the assessment. There is no doubt that a person may assent to surrender any of his rights of property, although such rights are secured by express constitutional provision, and the prosecutors here could have consented to and acquiesced in this assessment, but they have not done so, nor have they lost their right to be heard.

Connecting with the sewers cannot be regarded as an acquiescence on their part; their right so to connect is not made to rest on condition of paying the assessment; the consent of the commissioners and their own willingness is all that is needed for that. It would be as reasonable to hold a man to the payment of an illegal assessment upon his lands for the paving of a street, because, after the assessment, he drove his carriage over the pavement, as to oblige him to pay an improper assessment for building a sewer, for the reason that he had connected the land so assessed with the sewer. The improvement is made for the public benefit, and in the use of it the prosecutors, as part of the public, are entitled to share.

A land-owner cannot be held to pay an improper assessment, because he has purchased the lands subject to such assessment, and assumed to pay it as part of the consideration. *State, Evans, pros., v. Mayor, etc., of New Jersey*, 6 Vroom, 381.

All that the silence, acquiescence and acts of the prosecutors can bind to, is submission to a proper tax or assessment when legally imposed for the payment of their just proportion of the reasonable costs of the improvement.

Many other reasons were presented and urged on the argument for setting aside the assessment, but it is deemed unnecessary to consider them, as the assessment must be set aside for the reasons above stated.

The order will be, that the assessment, as to all the prosecutors in the several writs of *certiorari*, be set aside, and liberty is given on behalf of the defendants to apply, during the term, to set aside the whole assessment, if desired.

The Mayor, etc., of Jersey City ads. Riker.

THE MAYOR, ETC., OF JERSEY CITY ads. RIKER.

(9 Vroom, 225.)

Tax — recovering back after assessment has been set aside.

Where an assessment has been set aside by a court, one who has paid it, though voluntarily, may recover it back.

ON rule to show cause. The plaintiff was assessed for the benefit to his property in Jersey City, by the construction of a sewer, in the sum of \$810.57. This assessment was paid by him, and was subsequently set aside on *certiorari* in the Supreme Court. A reassessment of the expenses of this sewer was then made by the commissioners appointed under the act of 1873, p. 442, such reassessment amounting to the sum of \$333.73. This suit was brought to recover the difference between the sum paid and the amount thus reassessed. A verdict was taken for the plaintiff, and this motion was to set it aside.

I. W. Scudder and J. B. Vredenburg, for plaintiffs.

Douglass and Lewis, for defendant.

BEASLEY, C. J. The principal objection to a recovery in this case is, that the plaintiff, having voluntarily paid the tax assessed upon his property, cannot maintain a suit for reimbursement. The general doctrine thus invoked is indisputable. There are a multitude of cases to the purpose, that when money is demanded as a legal right, and it is paid without compulsion, and with a full comprehension of the facts, the money so paid cannot be reclaimed by a suit at law. The reason of this rule is, that the party paying had an opportunity to dispute the claim, and that having waived it at his own volition, it is impolitic to permit him to over-haul the transaction by an aggressive action. The doctrine is intended to be repressive of litigation, and is promotive of the policy expressed in the maxim, "*Interest republicæ ut sit finis litium.*" The principle is forcibly stated by Mr. Justice GIBBS in the well-known case of *Brisbane v. Dacres*, 5 Taunt. 152. His language is: "We must take this payment to have been under a demand of right, and I think that where a man demands money of another, as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily

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paid." Many decisions of like import can be found by referring to the notes in illustration of the judgment in the case of *Marriot v. Hampton*, 2 Smith's Lead. Cas. 400.

Nor are adjudications wanting which have enforced this rule, in its full rigor, in cases of payments of taxes which had been irregularly or illegally assessed. Chief Justice SHAW, in the case of *Lincoln v. Worcester*, 8 Cush. 55, declares that these are the three following requisites to a right to reclaim the money paid by force of illegal taxation: 1st. The authority to levy the tax must be wholly wanting; 2d. The money sued for must have been received by the corporation for its own use; 3d. The payment must have been made upon compulsion, and not voluntarily. Judge DILLON, in his Treatise on Municipal Corporations, says, that "unless these conditions are all present, payment under protest will not give a right of recovery." (Vol. 2, p. 857.) This learned author cites in his notes, in corroboration of his views, a lengthened line of concurring decisions.

But the doctrine thus established is not applicable to the present case. The plaintiff does not claim a right of action simply on the ground that he has paid an illegal tax. If such were his attitude the adjudications cited would defeat a recovery. But the suit does not rest on that basis. In this instance the authority to levy the tax was not wholly wanting, and the payment, in the legal sense, was voluntary; and under either of these conditions the law refuses to raise an implied promise to refund the money paid. Had this suit been brought upon the payment of the tax, and before any change in the situation had occurred, the case would have been the ordinary one presented in the reports and ruled by the decisions. But that is not so; there is a new element here, and that is, the tax which was paid has been set aside. The consequence is the payment has nothing, either in theory or in fact, to rest upon. The party is debarred from his action after a voluntary payment, because, of his own motion, he abandons his defense to the claim; this the present plaintiff did not do; on the contrary, he pushed his defense to a successful result. The payment of the tax in this instance has not added, in the least degree, to the litigation, and public policy, therefore, does not require a frustration of this procedure. The assessment being vacated by direct judicial action, the law raises an assumption to refund the money which can no longer be honestly retained. An assessment, in this respect, is analogous to a judgment, and when a judgment is reversed the defendant is restored, as nearly as practicable, to his original condition, and for this purpose a writ of restitution goes. In the case of *Close v. Stuart*, 4 Wend. 98, it is said: "The right of the plaintiff to the

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costs in error and to a return of the money becomes perfect by the reversal of the judgment," and it was consistently held that the money so due would form the subject of a set-off. In this court upon reversals of judgments restitution has been repeatedly ordered without regard to the fact whether such judgments have been voluntarily paid or not. *Randolph v. Bayles*, Penn. 52; *Anonymous*, id. 900; *McChesney v. Rogers*, 3 Halst. 335; *Scott v. Conover*, 5 id. 61. The principle of this course of law is, that after the judgment is annulled the money paid upon it is due to the defendant *ex æquo et bono*, and that there is no paramount inconvenience in allowing its reclamation. Certainly a tax assessment cannot be put upon higher ground; upon its vacation the money paid cannot, in good conscience, be retained by the public. In the present instance, the defendant has not a particle of right to the money in question; it is due to the plaintiff according to the principles of common honesty, and it is, therefore, not to be regretted that the attempt to withhold it by the *summum jus* has failed.

The other questions raised upon the argument have been examined, but they do not appear to me to be of any weight.

The rule should be discharged.

 NOICE V. BROWN.

(9 Vroom, 228.)

Promise to marry — when against public policy.

An agreement of a married man to marry, when a divorce should be decreed between himself and his wife in a suit then pending, is contrary to public policy, and void.

ON demurrer to the declaration.

Wm. Y. Johnson, for plaintiff.

John F. Hageman, for defendant.

BEASLEY, C. J. The declaration, to which a demurrer has been filed, complains in all its counts of a breach of a promise of marriage. These counts are special, and all contain the same facts. The case thus presented is, that the defendant, being a married man, and living apart from his wife, and in expectation of a divorce from her by force

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of a bill then pending, promised the plaintiff to marry her in a reasonable time after such divorce should have been obtained.

I cannot see the faintest semblance of legality in the promise here laid. It is wholly fallacious to suppose that a contract is not illegitimate if the act agreed to be done would not be illegal at the time of its contemplated performance. Such is not the law. A contract is totally void, if, when it is made, it is opposed to morality or public policy. The institution of marriage is the first act of civilization, and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and laws. But this relationship, in order to execute the purpose for which it is established, requires the undivided devotion of each of the parties to it to the other, and the consequence is that it is invaded and impaired by any thing which has a tendency to alienate such devotion. But this plaintiff claims the right to take to herself that affection of this husband, which, in legal theory at least, belong to the wife; but such a transfer the law will not sanction. Such conduct is a gross violation of the rights of the wife. Nor, in a legal point of view, does it at all strengthen the argument to suggest that the defendant, at the time of making this promise, was living separated from his wife, and was looking forward to a divorce. While the marriage exists the duties inherent in such marriage likewise exist, and they cannot be thrown off at the will of either party. By voluntarily withdrawing from the society of his wife a man cannot free himself from his matrimonial obligations. Nor can he do so in the hope of a divorce. If a husband can bind himself to a future marriage conditioned on the getting of a divorce, so he can incur a similar obligation to be put in effect on the dissolution of his marriage by the death of his wife. Such contracts are highly impolitic and highly scandalous, and are, therefore, illegal.

The demurrer must be sustained.

STEELMAN v. MATTIX.

(9 Vroom, 247.)

Bail — surrender by — liability of surety where surrender is prevented by act of law.

Bail are entitled to relief when the surrender of the principal is made impossible by the act of the law, where the plaintiff loses nothing by the omission of any act which it is in the power of the bail to perform. Whether relief will be granted by bringing up the principal on *habeas corpus*, or by extending the time for surrender, or by granting

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a discharge on motion, will depend upon the fact whether the one mode will be more beneficial to the plaintiff than the other.

The defendant, M., gave bond under the insolvent laws, conditioned that he would surrender himself to the sheriff of Atlantic county if his discharge as an insolvent was refused. At the time his discharge was refused, he was in the county jail of said county prior to his removal to the State Prison, to which he had been sentenced for crime. *Held*, that this did not excuse an actual surrender of M. to the sheriff. He could have said to the sheriff that he put himself into his custody according to the condition of the insolvent bond, and this would have enabled the sheriff to retake him after he had been liberated from incarceration on the criminal charge.

ON rule to show cause. The opinion states the case.

W. E. Potter, for plaintiff.

A. C. Scovel and *P. L. Voorhees*, for defendants.

VAN SYCKEL, J. This suit is upon a bond executed by the defendants under the insolvent laws of this State, conditioned that the defendant, Mattix, would appear and apply for the benefit of the insolvent laws of this State, and if he was refused his discharge as an insolvent debtor, that he would surrender himself to the custody of the sheriff of the county of Atlantic.

The breach assigned is, that Mattix was refused his discharge, and that he did not surrender himself. The defendants, on the trial of the cause, admitted that the discharge was refused, and offered to show in excuse that the surrender was rendered impossible by act of law; that, at the time the discharge was refused, Mattix was incarcerated in the county jail of Atlantic county, prior to his removal to the State Prison, to which he had been sentenced for a term of years for the crime of rape.

The question in the case is, whether this was a lawful excuse for the failure to make an actual surrender of the principal to the bond?

Cases of special bail are chiefly relied upon to support the defendants' case.

In the case of *Peter Vergen's Bail*, 2 Str. 1217, the principal, having been convicted of felony, was brought up by *habeas corpus* and surrendered in discharge of his bail in a civil action.

The same practice was adopted in *Sharp v. Sheriff*, 7 Term R. 226, where the principal was committed to prison on a charge of murder.

In *Trinder v. Shirley*, 1 Doug. 45, the principal having become a peer by succession to his brother, and it therefore being no longer in the power of the bail to surrender him, the court ordered an *exoneretur* to be entered on the bail piece. In *Wood v. Mitchel*, 6 Term R. 247, and in *Robertson v. Patterson*, 7 East. 405, an *exoneretur* was entered on the bail piece in the first instance, without bringing up the principal on *habeas corpus*. In

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the former case the defendant was under sentence of transportation for felony, and in the latter he was impressed into the king's service.

The same rule prevails in New York when the defendant has been sentenced for felony. *Cathcart v. Cannon*, 1 Johns. Cas. 28; *Loflin v. Fowler*, 18 Johns. 335; *People v. Bartlett*, 3 Hill, 570.

A distinction was made in *Biggnell v. Forrest*, 2 Johns. 482, where the defendant was detained in prison on a charge of felony before conviction, and a *habeas corpus* was granted to produce the body of the prisoner, that he might be surrendered in discharge of the bail.

In *Parker v. Chandler*, 8 Mass. 264, the court said that nothing but the act of God would excuse the bail, but this case was overruled by *Begelow v. Johnson*, 16 Mass. 218, and *Way v. Wright*, 5 Metc. 380. In the latter case the discharge was granted, on motion, without bringing the defendant into court by *habeas corpus*. The cases almost uniformly recognized the rule, that where the condition of a bond or recognizance becomes impossible of performance by the act of God, or of the law, or of the obligee, the obligation is saved. *People v. Manning*, 8 Cow. 297; *Taylor v. Taintor*, 16 Wall. 366; *Hillyard v. Mutual Ben. Ins. Co.*, 6 Vroom, 415.

The rule is thus stated in 1 Tidd's Pr. 293: "Whenever, by act of the law, a total impossibility or temporary impracticability to render a defendant has been occasioned, the court will relieve the bail from the unforeseen consequences of having become bound for a party whose condition has been so changed by operation at law, as to put it out of their power to perform the alternative of their obligation without any default, laches or possible collusion on their part."

There is no doubt that the bail are entitled to relief when the surrender is made impossible by the act of the law, where the plaintiff loses nothing by the omission of any act which it is in the power of the bail to perform; the governing principle being that as the power of making the surrender is taken away by an act of law, the obligation to surrender is thereupon discharged by law, as the surety cannot, by law, surrender his principal; he cannot, by law, be held answerable for not surrendering.

That the inability to surrender must flow wholly from the act of the law, and have no contribution from the neglect or omission of the contracting party, is illustrated by the case of *Taylor v. Taintor*, *supra*.

In that case the bail entered into recognizance for the appearance of the principal to answer to a criminal charge, and afterward suffered him to go into another State, and while there he was delivered up on the requisition of the governor of a third State, and there imprisoned for crime. Mr. Justice SWAYNE, in delivering the opinion of the court, said,

that if the principal had been arrested in the State where the obligation was given, and sent out by the governor, the bail would be exonerated; but the bail having the principal delivered into their custody, with full power to take and deliver him up at any time, must bear the loss which ensued from their permitting him to go beyond the limits of their State, where he was seized by a law not operative in the State where the obligation was assumed.

Whether relief will be granted to the bail by bringing up the principal on *habeas corpus*, or by extending the time for the surrender, or by granting a discharge on motion, or by pleading in excuse to an action against the bail, is the subject of discussion in cases hereafter cited. Whether the defendant shall adopt the one or the other of these modes of relief, I think, should be held to depend upon the fact whether the one will be more beneficial to the plaintiff than the other.

In *Aiken v. Richardson*, 15 Vt. 505, ROYCE, Justice, says: "That courts are at liberty to consider the effect of surrendering the principal, and if they perceive that it could be of no benefit to the creditor, they will not require it, but release the bail. This happens when the surrender cannot legally be followed by further proceedings against the body of the principal."

To the same effect is the language of Chief Justice POLAND in *McFarland v. Wilbur*, 35 Vt. 347: "It seems to us that the whole question hinges upon this: If the defendants had surrendered their principal, could the plaintiff have held his body till he satisfied his debt, or would he have been entitled to an immediate discharge, so that such surrender would have been wholly unavailing to the creditor?"

In cases where the bail are entitled to be discharged *ex debito justitiæ*, it has been held that they may apply for an *exoneretur* by way of summary proceeding, or plead the matter as a bar to a suit against them. This rule has been applied to that class of cases where the principal, if surrendered, would be entitled to an immediate and unconditional release from custody, as in case of a person discharged in bankruptcy proceedings, or where he dies before the bail is fixed, or is imprisoned by the State's authority, so that a *habeas corpus* will not be granted for the purpose of making an actual render. *Beers v. Haughton*, 9 Pet. 329; *People v. Manning*, 8 Cow. 297; *People v. Bartlett*, 3 Hill. 570; *Olcott v. Lilly*, 4 Johns. 407; *Mannin v. Partridge*, 14 East, 599; *Hulshizer v. Kocker*, Spencer, 390.

The rule being well settled, that where a performance of a condition is rendered impossible by the act of the law, the obligors are discharged, where there is no omission on their part to do any act which could avail

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the other party ; the only question in this case is, whether the offer of proof made by the defendants brought them within the operation of this rule ?

Mattix was not in the custody of his sureties ; they stipulated unconditionally for his surrender of himself, if his discharge as an insolvent was refused. The case differs from that of a recognizance to appear and answer to a criminal charge, and from special bail in civil cases. In the former case, when the term of imprisonment had expired, the principal could be re-arrested on criminal process, and in the latter a *ca. sa.* could issue after the penalty for the crime had been borne. But in the case of an insolvent debtor, released on bond under our statute, no mode is provided for his re-arrest after he is discharged from actual imprisonment. The bond is the creditor's only means of returning the debtor to custody, if a discharge is refused ; it can be effected only by his voluntary act in performance of his engagement, and, therefore, if the sureties are released the creditor would be remediless.

The defendants, therefore, should not be shielded by the rule of law which they have invoked, unless they show that the act of the law put it without the power of Mattix to save the plaintiff the protection which the insolvent bond was designed to give her.

It required no rule of court to surrender Mattix ; when the discharge was refused his obligation was simply to surrender himself to the sheriff. *Woodruff v. Barrett*, 3 Green, 40 ; *Voorhees v. Thorn*, 1 Zab. 77.

If Mattix had died before the term of court next after the execution of his bond, his sureties would not have been liable on the bond ; whether if he had been incarcerated in the State Prison at the time his discharge as an insolvent was refused, so that he could not by any action on his part have been given into the custody of the sheriff of Atlantic county, he would have been bound to surrender himself, when he was discharged from confinement, need not now be considered. In this case, at the very time he was refused his discharge, he was in the custody of the sheriff at the county jail, on the criminal charge, and it was in his power to say to the sheriff, that he put himself into his custody, also, according to the condition of the insolvent bond, in exoneration of his sureties. That would have been an actual surrender in compliance with his undertaking, not at all inconsistent with the fact that he was already held under the criminal charge, and it would have enabled the sheriff to re-take him after he had been liberated from incarceration for the criminal offense. For want of such voluntary surrender, neither the sheriff nor the plaintiff could re-take him after the expiration of his term of imprisonment. The surrender, therefore, was not rendered impossible by the act or

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operation of law, and the sureties are not released from their stipulation that Mattix should make it.

The court below properly refused to permit the defendants so to amend their pleas as to set up this defense.

The rule to show cause should be discharged.

MARSHALL V. WELWOOD.

(9 Vroom, 339.)

Nuisance — explosion of steam-boiler — liability of owner.

The owner of a steam boiler, which he has in use on his own property, is not responsible, in the absence of negligence, for the damages done by its bursting.

ACTION for damages done to the property of the plaintiff by the bursting of the boiler of a steam engine on the adjoining property of the defendant Welwood. Garside, the other defendant, had sold this boiler to Welwood, and was experimenting with it at the time of the explosion.

The case came before the court on a motion for a new trial, the verdict having gone for the plaintiff against both defendants.

J. B. Vredenburg, for the motion.

BEASLEY, C. J. The judge, at the trial of this cause, charged, among other matters, that as the evidence incontestibly showed that one of the defendants, Welwood, was the owner of the boiler which caused the damage, he was liable in the action, unless it appeared that the same was not being run by him, or his agent, at the time of the explosion. The proposition propounded was, that a person is responsible for the immediate consequences of the bursting of a steam boiler, in use by him, irrespective of any question as to negligence or want of skill on his part.

This view of the law is in accordance with the principles maintained, with great learning and force of reasoning, in some of the late English decisions. In this class the leading case was that of *Fletcher v. Rylands*, L. R., 1 Exch. 265, which was a suit on account of damage done by water escaping on to the premises of the plaintiff from a reservoir which the defendant had constructed, with due care and skill, on his own land. The judgment was put on a general ground, for the court said: "We

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think the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there any thing likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This result was deemed just, and was sought to be vindicated on the theory that it is but reasonable that a person who has brought something on his own property which was not naturally there, harmless to others, so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. This principle would evidently apply to, and rule, the present case; for water is no more likely to escape from a reservoir and do damage, than steam is from a boiler; and, therefore, if he who collects the former force upon his property, and seeks, with care and skill, to keep it there, is answerable for his want of success, so is he who, under similar conditions, endeavors to deal with the latter. There is nothing unlawful in introducing water into a properly constructed reservoir on a person's own land, nor raising steam in a boiler of proper quality; neither act, when performed, is a nuisance *per se*; and the inquiry consequently is, whether in the doing of such lawful act the party who does it is an insurer against all flaws in the apparatus employed, no matter how secret, or unascertainable by the use of every reasonable test, such flaws may be. This English adjudication takes the affirmative side of the question, conceding, however, that the subject is not controlled by any express decision, and that it is to be investigated with reference to the general grounds of jurisprudence. I have said the doctrine involved has been learnedly treated, and the decision is of great weight, and yet its reasoning has failed to convince me of the correctness of the result to which it leads, and such result is clearly opposed to the course which judicial opinion has taken in this country. The fallacy in the process of argument by which judgment is reached in this case of *Fletcher v. Rylands*, appears to me to consist in this: that the rule mainly applicable to a class of cases which, I think, should be regarded as, in a great degree, exceptional, is amplified and extended into a general, if not universal, principle. The principal instance, upon which reliance is placed, is the well-known obligation of the owner of cattle, to prevent them from escaping from his land and doing mischief. The law as to this point is perfectly settled, and has been settled from the earliest times, and is to the effect, that the owner must take charge of his cattle at his peril, and if they evade his custody he is, in some measure, responsible for the consequences. This is the doctrine

of the Year Books, but I do not find that it is grounded in any theoretical principle, making a man answerable for his acts or omissions, without regard to his culpability. That in this particular case of escaping cattle so stringent an obligation upon the owner should grow up, was not unnatural. That the beasts of the land-owner should be successfully restrained, was a condition of considerable importance to the unmolested enjoyment of property, and the right to plead that the escape had occurred by inevitable accident, would have seriously impaired, if it did not entirely frustrate, the process of distress damage feasant. Custom has had much to do in giving shape to the law, and what is highly convenient readily runs into usage, and is accepted as a rule. It would but rarely occur that cattle would escape from a vigilant owner, and in this instance such rare exceptions seem to have passed unnoticed, for there appears to be no example of the point having been presented for judicial consideration; for the conclusion of the liability of the unnegligent owner rests in *dicta*, and not in express decision. But waiving this, there is a consideration which seems to me to show that this obligation which is put upon the owner of errant cattle should not be taken to be a principle applicable, in a general way, to the use or ownership of property, which is this: that the owner of such cattle is, after all, liable only *sunt modo* for the injury done by them. that is, he is responsible, with regard to tame beasts who have no exceptionally vicious disposition so far as is known, for the grass they eat, and such like injuries, but not for the hurt they may inflict upon the person of others—a restriction on liability which is hardly consistent with the notion that this class of cases proceeds from a principle so wide as to embrace all persons whose lawful acts produce, without fault in them, and in an indirect manner, ill results which disastrously affect innocent persons. If the principle ruling these cases was so broad as this, conformity to it would require that the person being the cause of the mischief should stand as an indemnifier against the whole of the damage. It appears to me, therefore, that this rule, which applies to damage done by straying cattle, was carried beyond its true bounds, when it was appealed to proof that a person in law is answerable for the natural consequences of his acts, such acts being lawful in themselves, and having been done with proper care and skill.

The only other cases which were referred to in support of the judgment under consideration were those of one who was sued for not keeping the wall of his privy in repair, to the detriment of his neighbor, being the case of *Tenant v. Goulding*, 1 Salk. 21, and several actions which it is said had been brought against the owners of some alkali works for damages alleged to have been caused by the chlorine fumes escaping

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from their works, the case showed, had been erected upon the best scientific principles. But I am compelled to think that these cases are but a slender basis for the large structure put upon it. The case of *Tenant v. Gouiding* presented merely the question whether a land-owner is bound in favor of his neighbor to keep the wall of his privy in repair, and the court held that he was, and that he was responsible if, for want of such reparation, the filth escaped on the adjoining land. No question was mooted as to his liability in case the privy had been constructed with care and skill with a view to prevent the escape of its contents, and had been kept in a state of repair. Not to repair a receptacle of this kind when it was in want of repairs was, in itself, a *prima facie* case of negligence, and it seems to me that all the court decided was to hold so.

But this consideration is also to be noticed, both with respect to this last case, and that of the injurious fumes from the alkali works, that in truth they stand somewhat by themselves, and having this peculiarity: that the things in their nature partake largely of the character of nuisances. Take the alkali works as an example. Placed in a town, under ordinary circumstances, they would be a nuisance. When the attempt is made by scientific methods to prevent the escape of the fumes, it is an attempt to legalize that which is illegal, and the consequence is, it may well be held that, failing in the attempt, the nuisance remains.

I cannot agree that, from these indications, the broad doctrine is to be drawn that a man in law is an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others. The decisions cited are not so much examples of legal maxims as of exceptions to such maxims; for they stand opposed, and in contrast to principles which it seems to me must be considered much more general in their operation and elementary in their nature.

The common rule, quite institutional in its character, is that, in order to sustain an action for a tort, the damage complained of must have come from a wrongful act. Mr. Addison, in his work on Torts, Vol. I, p. 3, very correctly states this rule. He says: "A man may, however, sustain grievous damage at the hands of another, and yet, if it be the result of inevitable accident, or a lawful act, done in a lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action of damages." Among other examples, he refers to an act of force, done in necessary self-defense, causing injury to an innocent bystander, which he characterizes as *damnum sine injuria*—"for no man does wrong or contracts guilt in defending himself against an aggressor." Other instances of a like kind are noted,

such as the lawful obstruction of the view from the windows of dwelling-houses; or the turning aside, to the detriment of another, the current of the sea or river, by means of walls or dikes. Many illustrations, of the same bearing, are to be found scattered through the books of reports. Thus, Dyer, 25 b, says: "That if a man have a dog which has killed sheep, the master of the dog, being ignorant of such quality and property of the dog, the master shall not be punished for that killing." This case belongs to a numerous, well-known class, where animals which are usually harmless do damage, the decisions being that, under such conditions, the owners of the animals are not responsible. Akin to these in principle, are cases of injuries done to innocent persons by horses in the charge of their owners, becoming ungovernable by reason of unexpected causes; or where a person in a dock was struck by the falling of a bale of cotton which the defendants' servants were lowering (*Scott v. London Dock Co.*, 3 H. & C. 596); or in cases of collision, either on land or sea. *Hammack v. White*, 11 C. B. (N. S.) 588.

It is true that these cases of injury done to personal property, or to persons, are, in the case of *Fletcher v. Rylands*, sought to be distinguished from other damages, on the ground that they are done in the course of traffic on the highways, whether by land or sea, which cannot be conducted without exposing those whose persons or property are near it to some inevitable risk. But this explanation is not sufficiently comprehensive, for, if a frightened horse should, in his flight, break into an inclosure, no matter how far removed from the highway, the owner would not be answerable for the damage done.* Nor is the reason upon which it rests satisfactory, for, if traffic cannot be carried on without some risk, why can it not be said with the same truth, that the other affairs of life, though they be transacted away from the highways, cannot be carried on without some risk; and if such risk is, in the one case, to be borne by innocent persons, why not in the other? Business done upon private property may be a part of traffic as well as that done by the means of the highway, and no reason is perceived why the same favor is not to be extended to it in both situations. But, besides this, the reason thus assigned for the immunity of him who is the unwilling producer of the damage has not been the ground on which the decisions illustrative of the rule have been put; that ground has been that the person sought to be charged had not done any unlawful act. Everywhere, in all the branches of the law, the general principle, that blame must be imputable

* See *Brown v. Collins*, 16 Am. Rep. 372 and note.

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as a ground of responsibility for damage proceeding from a lawful act, is apparent. A passenger is injured by the breaking of an axle of a public conveyance; the carrier is not liable, unless negligence can be shown. A man's guest is hurt by the falling of a chandelier; a suit will not lie against the host, without proof that he knew, or ought to have known, of the existence of the danger.* If the steam engine which did the mischief in the present case had been in use in driving a train of cars on a railroad, and had, in that situation, exploded, and had inflicted injuries on travelers or bystanders, it could not have been pretended that such damage was actionable, in the absence of the element of negligence or unskillfulness. By changing the place of the accident to private property, I cannot agree that a different rule obtains.

It seems to me, therefore, that in this case it was necessary to submit the matter, as a question of fact for the jury, whether the occurrence doing the damage complained of, was the product of pure accident, or the result of want of care or skill on the part of the defendant or his agents.

This view of the subject is taken in the American decisions. A case, in all respects in point, is that of *Losee v. Buchanan*, 51 N. Y. 476; S. C., 10 Am. Rep. 623. The facts were essentially the same with those of the principal case. It was an action growing out of the explosion of a steam boiler upon private property, and the ruling was that such action could not be sustained without proof of fault or negligence. In that report the line of cases is so fully set out that it is unnecessary here to repeat them.

The rule should be made absolute.

NOTE.—See *St. Peter v. Dennison*, 17 Am. Rep. 258 and note.

 FREEMAN v. ROBINSON.

(9 Vroom, 383.)

Infant — liability of father for necessities. Consideration.

No action can be maintained against a father for goods purchased on his credit by a minor child, even for necessities, unless the father has expressly or impliedly authorized the purchase on his credit.

The mere moral obligation of a parent to maintain his child affords no legal inference of a promise to pay a debt contracted by the latter even for necessities.

* See *Kendall v. Boston*, 19 Am. Rep. 446.

A mere moral obligation or duty as an executed consideration is not a sufficient consideration to support a subsequent express promise.

Goods having been sold to a minor child of the defendant, on his credit, without his knowledge or consent, *held*, that a subsequent promise by the defendant to pay was invalid for want of a legal consideration. (See note, p. 403.)

ACTION brought before the First District Court of the city of Newark to recover for goods sold by the plaintiffs to a minor child of defendant, upon the defendant's credit. The cause was tried before a jury. The plaintiffs proved their books of account, showing the entries against the father for the son. It was proved that the goods were sold by the plaintiffs without the order, knowledge or consent of the defendant. The jury found a verdict for plaintiffs, upon which judgment was entered.

The defendant, being dissatisfied with the direction of the judge in point of law, appealed to the Court of Common Pleas, which court affirmed the judgment. Thereupon the defendant below sued out a writ of *certiorari*.

On *certiorari* of the Essex Common Pleas.

C. E. Hill, for plaintiffs in *certiorari*.

A. Struble, *contra*.

DEPUE, J. The duty of a father to provide maintenance for his children is a mere moral obligation. Except in cases within the statute of Elizabeth, and by the procedure there pointed out, he is not legally compellable to perform this duty.

No action can be maintained against a father for goods purchased on his credit by his minor child, even though they be necessities, unless the father has expressly or impliedly authorized the purchase on his credit. The authority of an infant to bind the father by contract for necessities may be inferred from slight evidence. But, nevertheless, where the parent gives no authority, and enters into no contract, he is no more liable to pay a debt contracted by his child even for necessities, than a mere stranger would be. 1 Parsons on Contracts, 299; 1 Chitty on Contracts, 210; *Mortimore v. Wright*, 6 M. & W. 482; *Raymond v. Loyl*, 10 Barb. 489; *Plotts v. Rosebury*, 4 Dutch. 146. The mere moral obligation of a parent to maintain his child affords no legal inference of a promise to pay a debt contracted by him even for necessities. *Shelton v. Springett*, 11 C. B. 452.

The case shows that the goods were sold by the plaintiffs to the defendant's son without the order, knowledge or consent of the father.

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The judgment therefore cannot be sustained on the ground of the agency of the son in making the contract in his father's name.

The judgment was sought to be sustained upon a promise by the father to pay, made after the goods were furnished. There was testimony tending to show that the defendant, after the goods were sold, had promised to settle the bill, or see it settled. The judge charged the jury, "that if they believed that the defendant did promise to settle or pay the bill, the obligation of the parent to provide for the minor child was a sufficient consideration for the promise, and would bind him."

There was no proof that the goods sold were such as were proper to be provided for the maintenance of the son, having regard to the estate and social position of his father, or were indispensable to his life or bodily comfort. The moral obligation of a parent to provide for his children must have some limit. It is not so far-reaching in its operation as to impose a duty on the parent to provide every thing which the taste or extravagance of the child may prompt him to desire, or tradesmen may see fit to provide. The obligation is limited to the furnishing of such articles as are necessary to the maintenance and support, leaving to the parent, in virtue of his parental authority, a discretion how far he may deem it prudent to exercise his generosity in the indulgence of his child. The case fails to show the existence of any moral duty on the part of the defendant toward his son, which would require him to supply the goods sued for. As the plaintiff was bound to make out his case by proof of a consideration which would support the promise, as well as the promise, the cause of action in this respect was not established.

But the charge was intended to present the question whether a moral duty without any legal obligation is a sufficient consideration to give validity to a subsequent express promise.

In *Hawkes v. Saunders*, Cowp. 290, Lord MANSFIELD said that "where a man is under a moral obligation, which no court of equity or law can enforce, and promises, the honesty and rectitude of the thing is a consideration." And Justice BULLER declared the true rule to be that "wherever a defendant is under moral obligation, or is liable in conscience and equity to pay, that is a sufficient consideration." The influence of these great names induced the opinion, which at one time prevailed, that a mere moral obligation, under all circumstances, was a sufficient consideration for an express promise. Subsequent examination of this doctrine, in the light of legal principles, has led to a modification of this opinion, and a repudiation of the principle in its generality of application.

In an elaborate note to *Wennall v. Adney*, 3 B. & P 247, the earlier
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cases, including *Hawkes v. Saunders*, are collected and subjected to a critical and discriminating examination. It is there observed, that Lord MANSFIELD "used the term 'moral obligation' not as expressive of any vague and undefined claim arising from nearness of relationship, but of those imperative duties which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that instance from legal liability." The justice of this observation is apparent from the cases stated by the Chief Justice as illustrations of the application of the doctrine. He enumerates promises to pay debts, the recovery of which is barred by the statute of limitations — a promise by a man after he becomes of age to pay a just debt contracted during minority, but not for necessities; a promise by a bankrupt after his certificate to pay his debts in full; and a promise to perform a secret trust, or a trust void for want of writing by the statute of frauds. In each of these instances there was, originally, a consideration of benefit to the promisor, for which a promise would have been implied capable of legal enforcement, if some statutory provision or positive rule of law had not debarred the party from legal remedy. Indeed, in the case then in hand, which was an action on a promise by an executrix, into whose hands assets had come, more than sufficient to pay debts and legacies, to pay the plaintiff his legacy, the defendant had received a consideration with respect to which a remedy might have been had by action, were it not for a technical rule of law.

In the note above referred to, the conclusion is arrived at from an examination of all the cases, that "an express promise can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

The principle thus enunciated was approved by Lord DENMAN in *Eastwood v. Kenyon*, 11 A. & E. 438, and adopted by the judges of the Queen's Bench in *Beaumont v. Reeve*, 8 Q. B. 486, and may now be considered as the settled law in the English courts. It has also been approved and made the basis of judicial decision quite generally by the courts in this country. *Smith v. Ware*, 13 Johns. 258; *Ehle v. Judson*, 24 Wend. 97; *Geer v. Archer*, 2 Barb. 420; *Mills v. Wyman*, 3 Pick. 207; *Dodge v. Adams*, 19 id. 429; *Wheaton v. Wilmarth*, 13 Metc. 422; *Cock v. Bradley*, 7 Conn. 57. In *Mills v. Wyman* the promise was made on wds by a father to pay expenses which had been incurred in relieving his son, of full age, who had been suddenly taken sick among

strangers. And in *Cook v. Bradley* the action was on a promise by a son, who was in affluent circumstances, to pay for necessities which had previously been furnished to his father, who was indigent, and in need of relief. In both cases the moral duty was recognized, but was held not to be a sufficient consideration to give validity to a subsequent promise. In *Dodge v. Adams* the moral obligation of a father to support his children was directly held not to be a sufficient consideration for a subsequent promise to pay for the board of his minor children, who had been taken from his house without his consent.

In *Briggs v. Sutton*, Spencer, 582, CARPENTER, J., gives his unqualified approbation to the rule above extracted from the note to *Wernall v. Adney*, and it may now be considered as the settled law, established on principle and authority, that mere moral obligation, or duty as an executed consideration, is not a sufficient consideration to support a subsequent express promise. If services be rendered, at the request of the promisor, which are for the benefit of a third party, toward whom the promisor owes only moral duties, they may be recovered for. In such cases, the precedent request and services rendered in compliance therewith afforded a consideration from which a promise to pay would be implied, or such as is needed to uphold an express promise. But where the duty is one of moral obligation only, and the service is rendered without a previous request, a subsequent promise to pay is without the consideration which is necessary to the validity of a contract.

The cases are collected and commented on in 1 Chitty on Contracts (11th Am. ed.), 52-60; 1 Smith's Leading Cases, 268, note to *Lamp-leigh v. Brathwait*; and in 1 Parsons on Contracts, 432.

The judgment should be reversed.

NOTE.—See to same effect *Kelly v. Davis*, (N. H.) 6 Am. Rep. 499. In *Raymond v. Loyl*, 10 Barb. 483, the Supreme Court of New York at General Term held that there is no legal obligation on a parent to maintain his child independent of the statutes, and that therefore the parent was not liable for necessities furnished his child in the absence of a contract on his part, express or implied, to pay for them. HAND, J., delivered a learned opinion in which he examined and criticised many authorities holding a contrary doctrine. See also *Chilcott v. Trimble*, 13 Barb. 502. There are dicta the other way in *Van Valkenburgh v. Watson*, 13 Johns. 480; *Clinton v. Rowland*, 24 id. 634; *Cromwell v. Benjamin*, 41 Barb. 558; *Henry v. Betts*, 1 Hilt. 156; *Dennis v. Clark*, 2 Cush. 347, 353; *Wicks v. Merrow*, 4 Me. 151; *Townsend v. Burnham*, 33 N. H. 270; *Filer v. Filer*, 33 Penn. St. 50. In *Cromwell v. Benjamin*, the wife and children were living together, and the goods were either furnished to the wife or to the children on the wife's authority, and the husband was properly held liable as the goods properly came in the category of necessities to wife.

That case was like the recent English case of *Bateman v. Forder*, L. R., 3 Q. B. 559, where in the husband was held liable to a third person for necessities furnished to his child on the order of his wife. This was on the ground that as she was justifiably living

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separate from her husband and had the custody of her child under statutory authority, the reasonable expenses of the child were part of her reasonable expenses. In the opinion of BLACKBURN it is intimated that a father's legal obligation to support his child is not more than to supply such food and clothing as are necessary for health.

COCKBURN, C. J., dissenting, said: "It is now well established that, except under the operation of the poor law, there is no legal obligation on the part of the father to maintain his child, unless, indeed, the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation," and to this point he cited the language of PARKE, B., in *Mortimer v. Wright*, 6 M. & W. 482, 488. See also *Urmston v. Newcomen*, 4 Ad. & E. 899; *Fluck v. Tollemache*, 1 C. & P. 5; *Shelton v. Springett*, 11 C. B. 452; *Kelly v. Davis*, 49 N. H.—REP.

THE STATE, BRADLEY, prosecutor, v. COUNCIL OF THE TOWN OF HAMMONTON.

(9 Vroom, 430.)

Municipal corporation — right of, to indemnify officers.

A town may, out of moneys raised for town purposes, indemnify its officers for reasonable expenses incurred by them in or through the *bona fide* discharge of their duties.*

ON *certiorari*. The opinion states the case.

King, for prosecutor.

Pancoast, for defendant.

DIXON, J. The affidavits in this case show that early in the year 1874, the council of the town of Hammonton, under the belief that the prosecutor had fraudulently got possession of some of the public moneys of the town, directed one of its members, Morrill Parkhurst, to institute legal proceedings against him therefor. Because of the proceedings so instituted, the prosecutor afterward brought suit against Parkhurst for malicious prosecution, upon the trial of which suit Parkhurst was acquitted. While this suit against Parkhurst was pending, the council, on March 30th, 1874, passed the following preamble and resolution: "Whereas, Morrill Parkhurst, a member of this council, having been prosecuted by one Rollin Bradley, for damages alleged to have been sustained by his arrest for obtaining money under false pretenses; and whereas, Mr. Parkhurst acted, in causing said arrest, under the instru-

* See *Gregory v. Bridgeport*, 19 Am. Rep. 485.

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tion of council: therefore, be it resolved, that the town defend the suit, and that a committee be appointed to wait on Bradley, and ascertain his views on the matter."

On motion, the clerk was authorized to employ counsel and manage the defense, and prosecute further, if necessary.

On September 26th, 1874, the committee reported progress, and, on motion, an order for \$250 was drawn for the use of the committee in paying necessary expenses.

The prosecutor, who is a tax payer in the town, seeks by *certiorari* to reverse these resolutions and orders of the council providing for Parkhurst's defense, on the ground of want of legal power in the council to do what it has thereby assumed to do. The reasons raise no question as to the *bona fides* of the transaction, or the fairness, in amount, of the appropriation.

The town of Hammonton was incorporated by act of the legislature, approved March 5th, 1866. Pamph. L. 188. By the seventh section of that act, the legislative power of the corporation was vested in the councilmen, who were also, for the purposes of that act, to do and perform the duties of, and be invested with the power and authority of the township committees of the townships of the State, in all cases wherein the exercise of such powers and duties should be required in said town. The twenty-ninth section enacts that the legal voters of said town shall have power and authority, at their annual elections in each year, to raise such sums of money as they may think proper and necessary for the support and maintenance of the poor of said town, for the support of common schools, for the making and repairing of roads and highways, and for an amount requisite for other town purposes, which said sums, when assessed and collected, shall be applied by the said councilmen to the purposes designated by the people at such election, and shall not, nor shall any part of the same, be used or applied to any other purpose whatever.

At the election held March 11th, 1874, the people voted \$1,000 for what are designated in this twenty-ninth section as "other town purposes," which sum was thereupon raised, and out of this sum the council claims the right to apply the amount in controversy in the manner indicated by their resolutions. The question for solution, therefore, is, whether the purpose for which this money is to be expended is a *town purpose*, within the meaning of the charter. It does not at all involve the inquiry whether a tax, levied under a vote of the electors, specifying the object no more definitely than "for other town purposes," could be legally enforced, but merely the question whether the money, being in

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the treasury generally for town purposes, can be applied by the council in the mode now intended.

By force of the twelfth section of the general township act (Nix. Dig. 9/3), township committees, and, under the provisions of the Hammonton charter, therefore, the council of this town, are charged with the duty of superintending the expenditure of all money raised by tax for the use of the corporation. It was therefore clearly the duty of the council, if the prosecutor wrongfully held the public moneys of the town, to institute proceedings for its recovery, and they had the right to institute such proceedings when they were reasonably satisfied that he so held them, even if, in truth, he did not. For such proceedings, the intervention of individual action was necessary, and the council could select for such action none more proper than one of its own members. It accordingly instructed Mr. Parkhurst to take those steps against the prosecutor which he pursued. No question has been raised as to the reasonableness of the judgment on which the council acted, or as to the *bona fides* of the measures which Mr. Parkhurst adopted under its instructions, except so far as they were impugned by the suit of the prosecutor against Mr. Parkhurst, in which the question was decided by the verdict in their favor. So that the resolutions now sought to be reversed are resolutions providing for the defense of a public officer, who has acted *bona fide*, in obedience to instructions which the council had the right to give him, in the performance of its and his duty to secure the public funds of the town. It is difficult to see how the purpose of such resolutions can be excluded from the class of "town purposes." Nothing can be more exactly a "town purpose" than the preservation of the town fund; that fund can be preserved only by the vigilance and vigor of its guardians; their activity can rarely be secured unless they are indemnified in its reasonable and honest exercise. Such indemnity, therefore, is bound in the class of town purposes by a short and strong chain.

The principle on which this result rests has been applied in many cases.

In *The King v. The Inhabitants of Essex*, 4 T. R. 591, the expenses incurred by the county magistrates in contesting unsuccessfully a fine which had been imposed on the county, were held to be payable out of the county stock. And Lord KENYON based his judgment in this proposition, that whenever a duty is imposed on a county, and where costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates, who have the superintendence over the county purse, have necessarily a right to defray such ex-

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penses out of the county stock. And BULLER, J., says, it would be absurd to say that those who have contracted on behalf of the county should not be defended at the expense of the county against a suit brought therefor.

In *Attorney-General v. Mayor of Norwich*, 2 Mylne & Cr 406, the court refused to interfere with resolutions of the council providing for payment, out of the borough fund, of the expenses of defending the mayor and one of the aldermen in *quo warranto* proceedings, it not being clearly alleged by the complainant that the *quo warranto* proceedings were not for the purpose of attaching the legal existence of the corporation. Lord COTTENHAM, Chancellor, said: "I apprehend it to be quite clear, according to the rule which applies to all cases of trust, that if necessary expenses are incurred in the execution of a trust, or in the performance of the duties thrown on any parties, and arising out of the situation in which they are placed, such parties are entitled, without any express provision for that purpose, to make the payments required to meet those expenses, out of the funds in their hands belonging to the trust. Such is the rule of this court; such, also, is the rule at common law."

In *Regina v. Lichfield*, 4 Q. B. 893, the right of the council of a borough to prosecute, at the expense of the corporation, for an assault upon the mayor in the execution of his duty, was admitted by Lord DENMAN, and WILLIAMS and COLERIDGE, Justices; and in *Regina v. Stamford*, 4 Q. B. 900, note *a*, the orders for payment from the borough fund of expenses incurred by two police officers in prosecuting a party who had assailed them, and in defending themselves against his prosecution, were quashed, not because of any want of power in the council to pay such expenses, but because a statute regulating the matter had not been pursued.

In *Lewis v. Mayor, etc., of Rochester*, 9 C. B. (N. S.) 401, it was held, that expenses, incurred in defending city officers against a *mandamus* designed to compel them to perform official duty, were properly chargeable on the borough fund, even though the *mandamus* had been allowed, the court thinking that there were reasonable grounds for undertaking the defense.

In *Regina v. Bridgewater*, 10 A. & E. 281, and *Regina v. Paramore*, id. 286, the court would not permit payment out of the borough fund, because no public purpose was subserved—no interest of the corporation was embodied.

In *Nelson v. Milford*, 7 Pick. 18, town assessors had collected by distress and paid in certain taxes, which were afterward held to have been

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irregularly assessed by them, and to save themselves from suit they had refunded the taxes to the individuals whose property they had distrained. It was held that the town had a right to reimburse the assessors.

In *Bancroft v. Lynnfield*, 18 Pick. 566, the court held that a town had the power to indemnify its officers against any charge or liability they might incur in the *bona fide* discharge of their duty, although it should turn out that they mistook their legal rights and authority.

In *Fulier v. Inhabitants of Groton*, 11 Gray, 340, the members of the school committee were sued for libel, because of some statements made in their official report to the town. For the expenses incurred in successfully defending themselves in that suit, the town voted to indemnify them, and appropriated money for the purpose. The court held that the town had a right so to do.

Hadsell v. Inhabitants of Hancock, 3 Gray, 526, was to the same effect. Selectmen were held to be entitled to recover from the town the amount of expenses incurred and a judgment recovered against them, for acts done in the *bona fide* discharge of their duty, for which the town had voted to indemnify them.

In the case of *The State, Lewis, pros., v. The Freeholders of Hudson County*, 8 Vroom, 254, this court refused to limit the boards of chosen freeholders in the payment of money, to those claims upon which an action at law might be maintained, and recognized their right to pay reasonable expenses incurred by public officers or private citizens in good faith, in furtherance of the due administration of justice.

And, in this case, the freeholders had not even authorized the incurring of the expense, but had taken their first action in the matter when the bill was presented for payment. A circumstance which, in *Regina v. Lichfield*, was regarded as of great weight against the right to pay. A less liberal rule than that applied in *The State, Lewis, pros., v. Freeholders of Hudson County*, would sustain the right of the council of Hammonton to pay the expenses now under consideration.

I am, therefore, of opinion that the resolutions of the council, passed March 30th, 1874, should be affirmed.

The resolution of September 26th, 1874, is open to criticism, in that it orders \$250 paid to the committee to meet necessary expenses. The proper procedure would be to have a bill of the necessary expenses presented to the council, approved by them and ordered paid, in accordance with the provisions of the act of April 4th, 1871. Pamph. L. p. 92. It nowhere appears that these provisions have been regarded, and the form of the resolution indicates that they have been overlooked. The reasons alleged by the prosecutor perhaps scarcely reach this defect, but the

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court ought not to even seem to sanction the payment of public moneys contrary to law. A payment under the resolution, as it now stands, might expose the members of council to the penalties of section 150 of the Crimes act. This resolution should, therefore, be set aside, to the end that the council may make its action more conformable to the statute.

No costs will be allowed to either party.

KANE V. THE HIBERNIA MUTUAL FIRE INSURANCE COMPANY.

(9 Vroom, 441.)

Fire insurance—defense of willful burning—amount of proof. Alienation—decree in foreclosure.

To an action on a policy of insurance, the defense was interposed that the plaintiff willfully set fire to the insured property. *Held*, that the defendant was bound to establish the defense beyond a reasonable doubt, and by the same measure of proof that would be required to convict the plaintiff if tried on an indictment charging that offense. (See note, p. 420.)

A policy of insurance conditioned to be void in case of alienation of the property, declared that "a judgment in foreclosure proceedings" should be deemed an alienation. *Held*, that a decree in a foreclosure suit, without further proceedings, was not an alienation.

ACTION brought on a fire insurance policy issued by the defendant to the plaintiff. The declaration was in the usual form of *assumpsit*. The pleas were—

First. The general issue.

Second. A plea that the policy was made void by reason of a breach of the conditions therein contained, prohibiting alienations.

Third. A special plea averring that the plaintiff did make an attempt to defraud the company, contrary to the conditions of the policy, by which it was made void.

Pursuant to an order made by the Chief Justice, a bill of particulars was given by the defendant to the plaintiff of the defenses under the second and third pleas.

It is stipulated and agreed that the pleadings, including the bill of particulars (to which was annexed, as part thereof, a copy of decree in action on foreclosure proceedings) may be referred to and used, if necessary, on the argument as part thereof.

The case came on for trial at the September Term of the Burlington County Circuit, before his Honor, Justice WOODHULL, and a jury.

The execution of the policy of insurance was admitted by the defendant, and was also proven by the plaintiff.

The plaintiff proved the destruction by fire of the building insured, during the continuance of the policy, and the value thereof. He also gave evidence tending to show that he had kept, performed and fulfilled all the clauses and conditions of the said policy of insurance on his part to be kept, performed and fulfilled.

The defendant, on his part, gave evidence tending to show that the building insured was burned by design, with the knowledge and procurement of the plaintiff; and that the plaintiff did make an attempt to defraud the company, contrary to a provision and condition of the said policy, by which it was made void.

After the testimony was closed, the defendant's counsel moved the court to nonsuit the plaintiff, on the ground that it appeared that before the happening of the loss, to recover which this suit was instituted, proceedings in foreclosure, a certified copy of which had been produced by the defendant and offered in evidence, had been commenced on a mortgage held by one Harriet B. W. Carter, given by the plaintiff herein, and covering the property insured, and that in such foreclosure proceeding a decree (copy of which decree is annexed to the bill of particulars as above stated) had been entered in favor of the complainant and against the defendant, the plaintiff herein, and that, by reason of said decree, the policy of insurance upon which this action is founded, became, was and is void. Defendant's counsel thereupon asked the court to charge the jury —

First. That by the terms of a clause inserted in said policy, in the body thereof, after its execution, the loss under it, if any, was payable to J. Wardell Brown, mortgagee, to the amount of \$1,500; that no recovery could be had in this action by the plaintiff, beyond the sum of \$1,500, with interest thereon, which, by the policy, remained payable to him.

And the said justice refused to charge as requested by the defendant's counsel, and did charge the jury that the plaintiff in this action might recover the whole amount of the insurance money mentioned in the said policy, notwithstanding the clause making the loss payable to J. Wardell Brown, mortgagee, to the amount of \$1,500, if the jury believed that the value of the premises equaled or exceeded the amount insured.

To which said charge and instructions of the said justice, the counsel of the defendant then and there excepted.

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Second. The counsel for the defendant further asked the said justice, at the same time, to charge the said jury that, as to the defense of burning by design, while the burden of proof was on the defendant to establish this defense, it was only necessary to do so by the fair weight or preponderance of the evidence. And the said justice then and there refused so to charge the said jury, and did then and there charge that, in order to make out such defense, the defendant was bound to establish the same beyond a reasonable doubt, and by the same measure of testimony that would be necessary to convict the plaintiff if tried under an indictment charging that offense.

To which charge and instruction of the said justice, the counsel for the defendant then and there excepted.

And the counsel for the defendant then and there further requested the said justice to charge the jury that, if they were satisfied by the evidence that before the fire occurred by which the loss claimed and sought to be recovered in this action was occasioned, proceedings in foreclosure as aforesaid had been commenced against the said plaintiff on the mortgage of the said Harriet B. W. Carter, for the foreclosure or sale of the mortgaged premises which embraced the property mentioned and described in the policy of insurance declared in, and that a judgment or decree (copy of which judgment or decree is annexed to the bill of particulars as above stated) had been obtained in the said proceedings against the said plaintiff prior to the said fire, that then there could be no recovery by the plaintiff, and that their verdict must be for the defendant, because, by the terms of the policy, it was to be void, in case there was alienation of the property insured, and because it is therein further provided that judgment in foreclosure proceedings should be deemed an alienation of the property; and the said justices then and there refused so to charge the said jury, and did then and there charge that said judgment or decree, in said foreclosure proceedings, would not preclude the plaintiff from maintaining this action.

The jury, after hearing the testimony and arguments of the counsel and the charge of the court, returned a verdict for the plaintiff, for the sum of \$3,261.33, being the full amount claimed in the said policy, with interest thereon, after the same became payable by the terms thereof.

It was ordered that the following questions, presented in the above stated case, should be reserved for the opinion of the Supreme Court, counsel of the respective parties consenting:

First. Did the court err in instructing the jury that the plaintiff might recover the whole amount of the insurance money mentioned in said policy, notwithstanding the said clause making the loss, if any, pay-

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able to J. Wardell Brown, mortgagee, to the amount, \$1,500, and in refusing to charge on this point, as requested by the defendant's counsel, as stated above?

Second. Did the court err in charging the jury, that as to the defense of burning by design, testimony to establish it must satisfy the jury of the fact beyond a reasonable doubt, and be such as would convict the plaintiff in case he had been indicted for that offense, and in refusing to charge as requested by defendants' counsel in this regard, as stated above?

Third. Did the court err in refusing to nonsuit the plaintiff, on motion of defendant's counsel, on the ground stated above, and in refusing to charge the jury, as requested by defendants' counsel, in regard to alienation of the property insured, and in charging the jury in relation to the same matter as above set forth?

In case the charging of the court, and the refusal to charge and nonsuit as requested, on these points reserved, was correct in law, judgment will be entered on the verdict of the jury in favor of the said plaintiff, and against the said defendant; if incorrect, then a *venire de novo* shall be awarded, and a new trial granted, with leave, however, to the said parties to sue out a writ of error to the Court of Errors and Appeals.

F. Voorhees, for plaintiff.

Cault, for defendants.

WOODHULL, J. Upon the foregoing state of the case, these questions were reserved for the opinion of the Supreme Court:

First. Did the court err in instructing the jury, that the plaintiff might recover the whole amount of the insurance money mentioned in the policy, notwithstanding the clause making the loss, if any, payable to J. Wardell Brown, mortgagee, to the amount of \$1,500?

It was admitted, on the argument, that this instruction was in accordance with the ruling of the Court of Errors in the *State Insurance Co. v. Mauckens*, 9 Vroom, 564.

The second question is, did the court err in charging the jury, that as to the defense of burning by design, testimony to establish it must satisfy the jury of the fact beyond a reasonable doubt, and be such as would be sufficient to convict the plaintiff in case he had been indicted for that offense?

Greenleaf (2 Greenl. Ev., § 408) states the rule to be, that "where the defense is that the property was willfully burned by the plaintiff

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himself, the crime must be as fully and satisfactorily proved to the jury, as would warrant them in finding him guilty on an indictment for the same offense." Citing *Thurtell v. Beaumont*, 1 Bing. 339 (8 E. C. L. 337). That was an action against an insurance company to recover the value of goods alleged to have been destroyed in the plaintiff's warehouse. At the trial before PARK, J., the defense set up was, that the plaintiff had willfully set fire to the premises, or caused them to be set fire to. In charging the jury, the learned judge directed them, that "before they gave a verdict against the plaintiff, it was their duty to be satisfied that the crime of willfully setting fire to the premises was as clearly brought home to him in this action, as would warrant their finding him guilty of the capital offense, if he had been tried before them on a criminal charge." A verdict having been found for the plaintiff, a new trial was moved for on the ground that the jury had been misdirected. It was urged in support of the motion, that in order to discharge the defendant from liability, it was not necessary the jury should entertain the same certainty with respect to the plaintiff's guilt, as would justify them in convicting him on a criminal charge; and that, without reference to the defense set up, they would, in that case, as in any other, be warranted in finding against the plaintiff, if he failed to make out his case to their entire satisfaction.

But the court were clearly of opinion that the direction was proper and refused to grant the rule on that ground.

In *Chalmers v. Shackel et al.*, 6 Carr. & P. 475, which was an action on the case for libel, in charging the plaintiff with the forgery of a certain bill of exchange, the same doctrine was applied. On a plea of justification, stating in substance that the plaintiff had been guilty of forging, etc., TINDALL, C. J., said to the jury: "We cannot consider the plea in any other way, or on any other kind of evidence, than if we were trying the plaintiff for the offense alleged in it."

In a similar case (*Wilmett v. Harmer et al.*), it was held by DENMAN, C. J., that a plea of justification to a libel, in which the defendant justifies on the ground that the plaintiff was guilty of bigamy, requires the same strictness of proof as is required on the trial of an indictment for bigamy. 8 Carr. & P. 695.

In the Supreme Court of the State of New York, in an action of slander for accusing the plaintiff of perjury, the judge of the Circuit Court having charged the jury, in substance, that the same testimony was necessary to prove the truth of the alleged slander, as to sustain a criminal prosecution for the perjury, it was held, on a motion for a new trial, that the charge was correct. SUTHERLAND, J., speaking for the

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court, says: "I understand the rule to be, as laid down by the judge, that where, in an action of slander, a defendant justifies a charge of perjury, one witness is not sufficient to prove the truth of the charge, and sustain the justification. The evidence must be the same as required to convict a defendant on an indictment for perjury. There must be either two witnesses, or one witness corroborated by material and independent circumstances." *Woodbeck v. Keller*, 6 Cow. 118.

The ruling in this case has been followed and approved in the later cases of *Clark v. Dibble*, 16 Wend. 601; and *Hopkins v. Smith*, 3 Barb. 599. The same doctrine has been held in Pennsylvania, in the case of *Steinman v. McWilliams*, 6 Barr, 170; in Indiana, in the cases of *Byrket v. Monohon*, 7 Blackf. 83; and *Lanter v. McEwen*, 8 id. 495; in Illinois, in the case of *McConnell v. Del. M. S. Ins. Co.*, 18 Ill. 228; in Tennessee, in *Coulter v. Stuart*, 2 Yerg. 225; in Maine, in *Thayer v. Boyle*, 30 Me. 475; and *Butman v. Hobbs*, 35 id. 227; and it is stated in *May on Insurance*, § 583, that the same rule was adopted by the Supreme Court of Florida in the recent case of *Shultz v. Pacific Insurance Co.*, 2 Ins. L. J. 495. Mr. May, however, does not approve the rule laid down in *Thurtell v. Beaumont*, and expresses the opinion that reason and the weight of authority are the other way. In support of this view, he refers to a number of very respectable authorities, most of which were cited by defendant's counsel on the argument.

In *Schmidt v. New York Union Mutual Fire Insurance Co.*, 1 Gray, 529, one of the cases referred to, and very similar in all respects to the one now before us, the judge refused to charge the jury that they must be satisfied, beyond any reasonable doubt, that the plaintiff purposely set fire to the property insured, before they could find for the defendants, but did instruct them that they must be satisfied, as reasonable men, of the truth of the allegations made by the defendants, before they could find in their favor. On exceptions by the plaintiff, it was held that there was no error in this instruction. "There seems," says DEWEY, J., in delivering the opinion of the court, "really to be but the slightest difference between the instructions actually given and those asked for by the plaintiff, understanding the terms 'beyond a reasonable doubt' in their proper sense, and under the limitations stated in the case of *Commonwealth v. Webster*, 5 Cush. 320." If the instructions, as given, were right, and were in substance the same as those called for by the plaintiff, it would seem to follow that the court below might, without error, have instructed the jury in the very terms of the plaintiff's request. But, however that may be, the point actually decided was, merely, that the court could not be *required*, in such a case, to instruct the jury in the precise

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form asked for by the plaintiff, viz.: that to warrant a finding against him, "they must be satisfied, etc., beyond a reasonable doubt." The case, therefore, if it cannot be regarded as inferentially recognizing the rule in *Thurtell v. Beaumont*, is clearly of no value as an authority against it.

The instructions given by the court below were all that the plaintiff had a right to require under that rule. They were, in legal effect, fully equivalent to the usual formula in criminal cases. For I take it to be metaphysically impossible that a jury should be satisfied, as reasonable men, of the truth of a given fact, without being at the same time satisfied of its truth beyond a reasonable doubt. See *Aeby v. Rapelye*, 1 Hill, 9.

In *Washington Union Insurance Co. v. Wilson*, 7 Wis. 169, referred to in *May on Insurance*, and cited on the part of the defendant in this case, the defense being that the insured willfully set fire to the property, the court held that the rule as to the degree or quality of evidence required to make out the defense was not the same as on an indictment, and that the jury should find for the party in whose favor the testimony preponderated. The only authorities cited in support of this doctrine were *Stark. on Ev.*, *Greenl. on Ev.*, and *Hoffman v. West, Mar. and Fire Ins. Co.*, 1 La. Ann. 216.

In this Louisiana case the court, without referring to any case or giving any reason for their opinion, simply say: "We think that the jury should not have been instructed to require the same full proof to discharge an insurer as would be necessary to convict the assured for arson under our statute." This, of course, is plainly in opposition to the rule adopted at the Circuit, and, as far as it goes, sustains the ruling in 7 Wis.

As to the citations from *Starkie* and *Greenleaf*, they seem to me not full enough to present the real doctrine held by those learned authors upon the point in question.

Mr. *Starkie* says: "It is to be observed that the measure of proof sufficient to warrant the verdict of a jury varies much, according to the nature of the case.

"Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact. * * * The distinction between full proof and mere preponderance of evidence is, in its application, very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved: neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt.

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" But in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale."

In the case referred to, the citation closes at this point, and is supposed to show that, in all civil cases, the rule, as to the measure of proof required, is that a mere preponderance on either side is sufficient to warrant a verdict in favor of that side. That such is the general rule in civil cases, there can be no doubt. And that the author, in the passage just quoted, was merely stating this general rule is apparent, if not from the passage itself, at least from what follows in immediate connection with it. Having said that "in many cases of a civil nature, etc., a mere preponderance of evidence on either side may be sufficient to turn the scale," Mr. Starkie goes on to say, "this happens, as it seems, in all cases where no presumption of law, or *prima facie* right, operates in favor of either party; as for example, where the question between the owners of contiguous estates is, whether a particular tree near the boundary grows on the land of one or of the other. But even where the contest is as to civil rights only, a mere preponderance of evidence, such as would induce a jury to incline to the one side rather than the other, is frequently insufficient. It would be so in all cases where it fell short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law. If a party claimed as devisee against the heir at law, full proof of the devise, with all its formalities, would be essential, etc. Again, where the law raises a presumption in favor of the fact, the contrary must be fully proved, or, at the least, such facts must be proved as are sufficient to raise a contrary and stronger presumption. Thus the law presumes a man to be innocent of a crime until his guilt be proved." 1 Stark. on Ev. *478, *479 (5th Am. ed., 1834, Phila.).

Speaking of matters in defense of an action on a policy of insurance, the same author uses this language: "The defendant may, under the general issue, adduce evidence to avoid the policy on the ground of fraud. The legal presumption in favor of innocence in this, as well as in all other cases, renders full and satisfactory proof necessary." 2 Stark. on Ev. *648.

In the passage cited from Greenleaf the author is treating of the law, of evidence in criminal cases, and in stating the distinction between civil and criminal cases. in respect to the degree or quantity of evidence necessary to justify the jury in finding their verdict, says: "In civil cases, their duty is to weigh the evidence carefully, and to find for the party

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in whose favor the evidence preponderates, although it be not free from reasonable doubt. But in criminal trials, the party accused is entitled to the benefit of the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor. It is, therefore, a rule of criminal law, that the guilt of the accused must be fully proved." 3 Greenl. on Ev., § 29.

But in this section the author, with respect to civil cases, manifestly intended nothing more than to state the general rule applying to them, without pausing to define, in that connection, the limitations of the rule. That he had already done, either in express terms, or by fair inference, in the volume relating specially to the law of evidence in civil cases.

The very class of cases to which the one then before the court belonged, he had expressly excluded from the operation of the general rule in civil cases, citing as his authority for so doing the very case (*Thurtell v. Beaumont*) of which the court, in *Schmidt v. Wash. Ins. Co.*, say (citing this author and Mr. Starkie, and *Hoffman v. West. F. & M. Ins. Co.*, as their authorities), that it appears to them to be "contrary to the authorities, and cannot be sustained on principle." See 2 Greenl. on Ev., § 408, quoted above.

Another class of cases expressly excluded from the operation of the general rule in civil cases are actions of libel and slander, in which there have been special pleas in justification imputing crime. Of such cases Mr. Greenleaf remarks, that "to support a special plea in justification, where crime is imputed, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime imputed to him; and it is conceived, that he would be entitled to the benefit of any reasonable doubt of his guilt, in the minds of the jury, in the same manner as in a criminal trial." 2 Greenl. Ev. 426.

The use which has been made of the names of these eminent writers on the law of evidence, in opposition to the rule in *Thurtell v. Beaumont*, seems to me to be justified neither by the language, as interpreted by themselves, nor by any just deduction from their principles, or their reasoning.

Instead of impugning that rule, it will be found that both of them do, in fact, either expressly or by necessary inference, sanction it. *Wightman v. West. Mar. & Fire Ins. Co.*, 8 Rob. (La.) 442, is to the same effect as the case already noticed; *Hoffman v. Same Co.*, 1 La. Ann. 216.

Another case on the same side, referred to in *May on Insurance*, p. 721, is *Scott v. Home Ins. Co.*, 1 Dillon (C. Ct. U. S.), 105. The action was on a fire policy, and the defense, that the plaintiffs willfully burned their own property covered by the policy. It was held that in such an

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action so defended, the rule in civil, and not the one in criminal cases, as to the quantum of proof, applies ; but that in view of the nature of the charge, the evidence to establish it ought to be such as clearly to satisfy the jury of its truth.

After stating the difference between the ordinary rule in civil actions, and the rule in criminal cases as to the measure of proof required, DILLON, J., instructed the jury as follows : " The court instructs you, that it is not necessary that the degree of proof should be the same as if the plaintiffs were on trial under an indictment for willfully burning the property to defraud the insurance companies. On the contrary, as between the rule in criminal and the rule in civil cases, as above defined, it is the rule in civil cases that is to be your guide in this case. But the charge is a grave one. The act charged is one which men, in general, will not commit, but of which men are sometimes guilty ; in view of which, the court instructs you, that in order to justify you in finding that the plaintiffs themselves burned, or caused the property to be burned, the legal evidence, taken altogether, must be such as *clearly satisfies* you of the truth of the position. It need not be such as to exclude all doubt, but it should be such as to satisfy your minds and judgments that they did, or caused or procured the act in question to be done. On this point, the decided cases are conflicting, but the foregoing seems, to the court, to express the sound and true rule of law on the subject."

These instructions, as it seems to me, are open to the criticism, that while they are formally in favor of the application of the ordinary rule in civil cases, namely, that a mere preponderance of evidence, one way or the other, is sufficient to warrant a verdict, the rule actually laid down for the guidance of the jury, in respect to the measure of proof required to sustain the defense, is, in substance and effect, the same as the rule in *Thurtell v. Beaumont*.

I submit, with great deference to the eminent jurist who delivered, and the learned judges who approved these instructions, that evidence which " clearly satisfies " a jury, which *satisfies their minds and judgment* as to the truth of any proposition, although it may not be such as to exclude *all doubt* must, nevertheless, of necessity, exclude every doubt which would prevent a settled belief of that proposition ; and this is precisely what I understand to be indicated by the phrase " reasonable doubt."

It follows, from what has been said, that while the instructions to the jury in the case just referred to, were, to a certain extent, wrong in theory, namely, in assuming the case to be within the ordinary rule applied to civil cases, and in assuming that the measure of proof which

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the jury were instructed to require before they could find against the plaintiffs, was the measure of proof required in ordinary civil cases. They were, nevertheless, practically right. The degree of proof indicated as being necessary to warrant a verdict against the plaintiffs in that case being, in fact, the same as would have been sufficient to convict them on an indictment for the offense imputed to them.

The only remaining case to be noticed on the side of the defendant is *Sloan v. Gilbert*, decided very recently in the Court of Appeals of Kentucky. Law and Equity Reporter, April 5th, 1876. Although the court in that case disapprove and reject the rule laid down in *Thurtell v. Beumont*, they do not hesitate to admit that it is supported by the great weight of authority, English and American.

COPER, J., delivering the judgment of the court, says: "There can be no doubt but such is, and has long been the rule in England, and that it has been recognized by the courts of last resort in a majority of the States of the Union, and is approved by 2 Greenleaf's Ev. 426; Townsend on Slander and Libel (2d ed.), 644, and Hilliard."

In regard to the reasonableness of the rule against which much has been said in the case just referred to, and in other cases, I remark that, whether applied to criminal or civil cases, the reason of the rule seems to me to be the same, and the rule itself rests upon precisely the same foundation. viz.: that legal presumption in favor of innocence, a presumption which is not, as some seem to suppose, an arbitrary contrivance to screen the guilty when under indictment, but a conclusion of law drawn from general experience of human conduct, and designed to protect the innocent — a presumption of such potency that it can be overcome by nothing short of full and satisfactory proof — that is, by the highest measure of proof defined by the common law, as distinguished from that by mere preponderance of evidence. As the rule in question merely recognizes and gives effect to this universal presumption of law, I cannot think that it is either unreasonable or unjust.

The third question presented is, whether a decree for sale in an ordinary foreclosure suit is, in the sense of the policy, "a judgment in foreclosure proceedings" which "shall be deemed an alienation of the property." To show the connection in which these expressions occur in the policy, I quote from it as follows: "And provided further, that if any other insurance has been or shall hereafter be made upon the said property, and not consented to by this company in writing hereon, or if the said property shall be sold or conveyed, either partially or wholly, or if this policy shall be assigned either before or after loss or damage shall occur, without the consent of the company obtained in writing thereon,

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or if the assured shall make any attempt to defraud the company, then, and in every such case, this policy shall be null and void. A judgment in foreclosure proceedings, or sale under an execution, shall be deemed an alienation of the property."

This is purely a question of construction.

It was clearly the intention of the parties that "an alienation of the property" should render the policy null and void.

But what, precisely, is meant by the phrase "an alienation of the property?" Was it to be an actual transfer of the title to the property or merely some proceeding or series of proceedings tending to that result. The word itself, "alienation," is not used elsewhere in the policy. But we are not left without an indication, at least, of the meaning intended to be conveyed by it. It had just been provided that, "if the said property should be sold or conveyed, the policy should be null and void." Then follows, immediately, the provision that a judgment in foreclosure proceedings or sale under an execution, shall be deemed an alienation, etc., probably referring, as it seems to me, to the alienation just before mentioned as a ground of forfeiture, namely, by sale or conveyance of the property. I take the true meaning of this part of the policy to be the same as it would be if, for the words "shall be deemed an alienation of the property," there should be substituted the words "shall be deemed such a sale or conveyance of the property as aforesaid." The fair deduction, from the language of the policy, is, that the alienation intended was such as would amount to an actual transfer of the title, and that by the phrase, "a judgment in foreclosure proceedings," was meant some proceeding which, of itself, would effect such a transfer. This result, a decree of strict foreclosure would accomplish.

But a mere decree for sale on a foreclosure suit, without further proceedings, could have no such effect. My conclusion upon the whole case is, that the charge of the court upon the several points reserved was correct, and that judgment must therefore be entered on the verdict of the jury in favor of the plaintiff.

* NOTE.—In *Ellis v. Buzzell*, 60 Me. 209; 11 Am. Rep. 204, in an action for slander in charging the plaintiff with adultery—a crime under the statute—the plea that the words were true was interposed. *Held*, that a preponderance of evidence would support the plea, and that the defendant was not bound to prove the plea beyond a reasonable doubt as on indictment for crime. The question was ably considered in that case. BARROWS, J., delivering the opinion of the court, said: "But we think it time to limit the application of a rule which was originally adopted *in favorem vite* in the days of a sanguinary penal code, to cases arising on the criminal docket, and no longer to suffer it to obstruct or incumber the action of juries in civil suits sounding only in damages."

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The same doctrine was held in *Blawser v. Milwaukee Mechanics' Mutual Ins. Co.*, 37 Wis. 31; 19 Am. Rep. 747.

In a note to 2 Greenl. Ev., § 408 (cited in the principal case), in the thirteenth edition, the editor says: "The doctrine of the text, if supported by the cases cited, has been very generally disapproved," citing *Ellis v. Buzzell*, *supra*; *Schmidt v. N. Y. Union Mut. Ins. Co.*, 1 Gray, 529; *Wash. Ins. Co. v. Wilson*, 7 Wis. 169; *Scott v. Home Ins. Co.*, 1 Dill. 105; *Vaughton v. L. & W. R. R. Co.*, L. R., 9 Ex. 93.

The English rule seems to be that if the commission of a crime is directly in issue in any action, criminal or civil, it must be proved beyond reasonable doubt. Stephens' Digest Law Ev., art. 94; *Chalmers v. Shackell*, 6 C. & P. 475; *Thurtell v. Beaumont*, 1 Bing. 339; *Willmet v. Hurmer*, 8 C. & P. 685; *Neeley v. Lock*, *id.*

But BARROWS, J., pointed out in *Ellis v. Buzzell*, *supra*, that in England there was a reason for the rule in what Lord KENYON remarked in *Cook v. Fields*, 3 Esp. 133, that "when a defendant justifies words which amount to a charge of felony and proves his justification, the plaintiff may be put upon his trial by that verdict without the intervention of a grand jury."

In 2 Greenl. Ev., § 426 (13th ed.), the author states what he understands the rule to be thus: "To support a special plea in *justification* [of a libel or slander] where *crime* is imputed, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime imputed to him; and it is conceived, that he would be entitled to the benefit of any reasonable doubts of his guilt in the minds of the jury in the same manner as in a criminal trial." In a note the editor says: "This proposition can hardly be law. It is by no means certain that *Chalmers v. Shackell* is an authority even in England, for the rule stated. *Magee v. Magee*, 11 Irish Com. Law, 449. However that may be, it is repudiated in this country, by the great weight of modern authority," citing beside some of the cases above, *Knowles v. Scribner*, 57 Mo. 497; *Matthews v. Huntley*, 9 N. H. 150; *Gordon v. Parmelee*, 15 Gray, 413; *Kinvade v. Bradshaw*, 3 Hawk, 63; *Marshall v. Marine Ins. Co.*, 43 Mo. 586. The same doctrine was held in the recent case of *Rothschild v. The American Central Ins. Co.*, 62 Mo. 356.

A contrary rule is followed in Iowa, *Fountain v. West*, 23 Iowa, 9; *Ellis v. Lindley*, *id.* 461; and in Indiana, *Tucker v. Call*, 45 Ind. 31.

See, also, 10 Am. Law Rev. 642, where the cases are collected and carefully examined.—**REP.**

TORREY v. BURNETT.

(9 Vroom, 457.)

Fixture — right to remove after term.

A landlord agreed to sell a trade fixture for the tenant's benefit, and the tenant left it after the expiration of his term. The landlord failed to sell it. *Held*, that the tenant had a reasonable time after the term to remove it, and that his creditors had the same right by attachment.

ACTION on the case. The following is the decision of the Court of Errors and Appeals.

Jos. F. Randolph, for plaintiff in error.

John Linn, for defendant in error.

BEASLEY, C. J. This is an action on the case for an injury to the reversion. The plaintiffs were the owners of the land, and one Isaac H. Tice was their tenant. The defendants are creditors of Tice, and upon his leaving the State they took out an attachment, and, entering on these premises, which had been leased to their debtor, took down and carried away a steam engine, put up by him, and it is this act that forms the ground of this action. In the damages recovered by the plaintiffs is included the value of this engine.

The contention necessary to the support of this suit is, that the engine in question had ceased to be a removable fixture, by reason of its having been left upon the premises by the tenant after his term had expired. That the right existed to remove this article of property during the tenancy was not disputed; as between landlord and tenant, it was a trade fixture, and was clearly removable if taken away in time. But when the defendants levied their attachment, the term had run out, and the tenant had quitted the possession, and the argument, founded on these facts, was, that the right of the tenant to remove the fixture was gone, and that, after such lapse, neither he nor his creditors could lawfully enter and remove the engine.

This was the substantial question, although it was much urged on the argument that there was another ground on which the action could properly be rested. This was, that the judgment in attachment, under which the defendants justified, was radically defective, and void. But this defect, even if it exists, will not alone sustain the judgment in its present form. On the assumption that the defendants are naked trespassers, the plaintiffs cannot recover of them damages for the taking away of this engine, unless, at the time of such taking, it was a part of the land. This results from the capacity in which the plaintiffs sue; they were not in possession at the time of the injury complained of, and they have necessarily sued as reversioners. Standing in such capacity on the record, the damages for which the wrong-doer is answerable to them are such only as are of a permanent nature, so that a mere wrongful entry upon the land and the removal of a chattel could not form a foundation of this suit. Very plainly, to uphold their case, the plaintiffs must show the steam engine in question had become incorporated with the land, so as to be parcel of it.

Was this the case? I have said that this fixture, during the running

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of the tenancy, was removable. But the term in the land had expired, and the tenant had left the property, when this entry and taking occurred. It is undoubtedly the settled rule of law, that where a tenant has the right to remove fixtures, he must exercise his right during the continuance of his term, or before he surrenders the possession of the premises; he cannot re-enter for such purpose. A multitude of cases have been decided in accordance with this doctrine, many of which can be found by a reference to the notes to the case of *Elwes v. Mawe*, 2 Smith's Lead. Cas. 228. And it was in submission to this rule that the judge, at the trial in the present case, instructed the jury adversely to the defense. Such instruction would have been incontestably correct if there had been no other conditions of the case than those already specified. But such was not the fact. There was evidence tending to show that before the defendants had altogether yielded up the possession of the premises, in a conversation with one of the plaintiffs, it was understood that the plaintiffs would endeavor to sell for the defendants this steam engine, to a person who was then in treaty for the purchase of the land. Looking at the whole of the testimony on this subject, it is, perhaps, a fair conclusion that the tenant failed to remove the engine in consequence of this arrangement. Upon the assumption that such an undertaking on the part of the landlords existed, I can have no doubt that its effect is to debar them from claiming that the chattel in question became theirs as an unremovable fixture, by reason of the surrendering up of the possession of the premises. For a landlord to claim a chattel affixed to the land, on the ground that the tenant had failed to remove it while in possession, when such failure had been occasioned by his own promise to sell the fixture for the benefit of the tenant, would, in morals, be a sheer fraud, and the general legal principle above stated is not so inflexible that it is to be so applied as to render such an attempt, when made, successful. The reason upon which the rule itself rests is totally opposed to such an application of its control. The rule, in the rigor of its generality, is derived from the Year Book, 20 Henry VII, in which, speaking of the tenant, it is said: "During his term he may remove them, but if he suffer them to remain fixed after the term, they belong to the lessor." This is a bold statement of the law, without any reference to its spirit: but in *Poole's Case*, 1 Salk. 368, Lord Holt reached the heart of the subject by saying: "After the term, they [the fixtures] become a gift in law to him in reversion, and are not removable." The same groundwork for the rule is indicated by Lord Kenyon, in *Penton v. Robart*, 2 East, 88, in which the stringency of the principle was somewhat relaxed, it being decided that a tenant remaining in possession after

the end of his term could take away removable fixtures. The reason assigned for this mitigation of the severity of the rule is, that as the tenant remained in possession at the time of the taking away of the fixtures, there was no pretense to say that he had abandoned his right to them.

It would seem to be clear that, in the view of these great common-law judges, the landlord's right to the removable fixtures originated in an implied gift on the part of the tenant, such implication arising from the fact that the tenant, at the end of his term, abandoned the property without removing them. Such presumption is undoubtedly a presumption of law, and how far it is liable to be rebutted has not been entirely defined. In the valuable note of Mr. Smith, in his volume of *Leading Cases* already referred to, it is said, in treating of the possibility of overcoming this legal presumption, "it has never been determined what might be the effect of a formal declaration of the tenant, on quitting, that he did not intend to give them to his landlord. It would, however, probably be held inoperative, on the principles explained in *Marston v. Roe*, 8 A. & E. 59." This inference, that the notification by the tenant of a reservation of his right would be inefficacious, I have little doubt would be sustained if ever a case should arise presenting the precise point for decision, as it would seem utterly inconsistent with all legal science to permit a man to reserve a right which involves, in its enjoyment, a plain trespass to the property of another. But while this seems to me clear, I think it is equally so that this legal presumption of a gift may be repelled by proof of the assent of the landlord to the retention by the tenant of his right of removal. In my opinion, if the landlord should say to the tenant that he should have a certain time within which to remove his fixtures, such a license would be valid, and would prevent, for the time being, the incorporation of the fixtures into the land. Such stipulations as those are common in leases, and in that form have been frequently enforced by judicial action. As the fixture is a chattel, such arrangements need not be in writing, and they can arise by implication as well as by express agreement.

It is upon this ground that I think this judgment should be reversed. The agreement on the part of the landlords to endeavor to effect a sale of the fixture for the benefit of the tenant, carried with it an implied permission that it might be removed if such endeavor proved to be unsuccessful. Such arrangement, of necessity, involved the fact that the tenant did not intend to abandon the fixture to the landlord, and it is quite unreasonable to suppose that such an abandonment was meant in case a sale was not effected. The engine was left on the property for

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a specific purpose, and with the assent of the land-owner; such purpose having failed, the tenant did not lose his property, but was entitled to remove it within a reasonable time. Under these circumstances, it is impossible to consider the chattel in question as a part of the realty, or that its removal worked an injury to the reversioner. The facts should have been left to the jury, with instructions as to the law, in accordance with the foregoing view.

The judgment must be reversed.

For affirmance — None.

For reversal — THE CHANCELLOR, CHIEF JUSTICE, DEPUE, READ, SCUDDER, VAN SYCKEL, WOODHULL, CLEMENT, DODD, GREEN, LULLY, WALES — 12.

WOLCOTT V. MOUNT.

(9 Vroom, 496.)

Sale — representations as to vegetable seeds — implied warranty — measure of damages.

A statement made in good faith at the time of sale, by the vendor, that seed is of a certain kind, such seed, with respect to kind, not being ascertainable by inspection, will lay a ground from which a jury, or a court having power to pass upon facts, may infer a warranty as to kind.

Where seed are warranted as to kind, and the vendor knows the use to be made of the seed, he is answerable for the difference between the value of the product of the seed sold, it being put to the use specified, and the value of the product that would have resulted had the seed corresponded to the warranty. (*See note, p. 430.*)

ON error to the Supreme Court. For proceedings in this case and opinion of the court below, see 13 Am. Rep. 438.

Henry G. Clayton, for plaintiffs in error.

Joel Parker, for defendant.

BEASLEY, C. J. The plaintiffs in error sold to the defendant in error certain seed as and for "early strap-leaf red-top turnip seed." The seed, being planted, turned out to be of a different kind, so that the defendant lost his crop. It was shown in the case that the plain

tiffs in error believed, at the time of the sale, that the seed was of the kind which the defendant sought to purchase. The defendant in error brought his suit before a justice, on the ground that the sale to him, under these conditions, comprised a warranty. The decision was in his favor, and such judgment was affirmed in the Common Pleas, and, on *certiorari*, in the Supreme Court.

Therefore, the point before this court now is, whether, on the facts stated, the Court of Common Pleas could lawfully infer that the plaintiffs in error warranted the article sold to be of the particular kind for which it was purchased.

The subject of warranty, in its application to the class of cases in which the present one is comprehended, has been involved in much confusion. The authorities are not consistent, and they are very numerous. It has always seemed to me that a considerable part of this contrariety has arisen from a misapprehension with respect to what was decided in the famous case of *Chandelor v. Lopus*, Cro. Jac. 4. The only question in that case, as I understand it, was, as to the sufficiency of the averments in the declaration. The plaintiff's case appearing upon the record, is stated in the report in these words, viz. : "Whereas, the defendant being a goldsmith, and having skill in jewels and precious stones, had a stone which he affirmed to Lopus to be a bezoar stone, and sold it to him for a hundred pounds; *ubi revera*, it was not a bezoar stone." The contention in the court of error, upon this record, was, that enough did not here appear to charge the defendant, because it was shown neither that he warranted it to be a bezoar stone, nor knew it to be such. Instead of a warranty being expressly laid in the declaration, a mere affirmation as to the kind of article sold, was laid, and it was this form of pleading which was adjudged to be bad. (Now, an affirmation of this kind may or may not be a warranty, according to circumstances) and the fault of the pleading, therefore, was, that instead of a warranty, it set forth inconclusive evidence of a warranty. The pleader was bound to state the transaction according to its legal effect, and this was all that was decided. And such a form of statement, at the present day, would, I think, be deemed ill.

But this decision has been many times cited, not as an illustration of the rule of pleading, but as an example of the insufficiency of the affirmation specified in the case to prove a contract of warranty; and this, in my opinion, is an evident misuse of the precedent, which has been introductive of confusion. It was such abuse that resulted in the judgment in *Seizas v. Woods*, 2 Caines' R. 48, which asserted that a warranty would not arise from a description of the kind of the article sold. This decision was followed by several others in a similar vein; but the ground upon

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which this line of cases rested, after being much criticized and discredited, has been formally repudiated by the Court of Appeals of New York, in *Hawkins v. Pemberton*, 51 N. Y. 198; S. C., 10 Am. Rep. 595.

The tendency or recent adjudications has been, I think, to put this subject on a reasonable footing. Starting from the admission that, in the absence of fraud and of a warranty, the rule of *caveat emptor* applies, the effort is, not to elevate particular expressions contained in a given contract into a general rule of law, but to regard each case in the light of its own circumstances, and with respect solely to the understanding of the parties. Whether the representation or affirmation accompanying a sale shall be regarded as a warranty or as *simplex commendatio*, is a question to be solved by a search for the intention of the contracting parties. The two cases of *Jendwine v. Slade*, 2 Espinasse, 572; and *Power v. Barham*, 4 A. & E. 473, are conspicuous examples of this rule. In the former there was a sale shown of two pictures, the catalogue of the auction, describing one as a sea piece, by Claude Lorraine; and the other, a fair, by Teniers. This description was held by Lord KENYON to be no warranty that the pictures were the genuine works of the artists referred to, but merely an expression of the opinion of the vendor to that effect. In the other case, it appeared that, at a sale of four pictures, they were described as "four pictures, views in Venice—Carnaletti," and it was left to the jury to decide whether the intention was to warrant the pictures as authentic, the court distinguishing this case from the former one by the circumstance that Carnaletti was comparatively a modern painter, the authenticity of whose works was capable of being known as a fact, while, with respect to the productions of very old painters, an assertion as to their genuineness was necessarily a matter of opinion. In these instances the respective affirmations of the vendor were of equivalent import, intrinsically considered; but it was left open, as a matter of inference, whether they were to have the same signification when used under variant circumstances. The question consequently is, in every case of this kind, whether the conditions were such that the vendee had the right to understand, and did so understand, that an affirmation or representation made by the vendor was meant as a warranty.

And for the determination of this question, Mr. Benjamin, in his admirable Treatise on Sales, page 499, says: "A decisive test is whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty; in the latter, not."

This criterion is the product of the learned author's study of the English decisions, and it appears to me to be the most satisfactory one which can be adopted. It is exemplified in a vast number of cases, many of which are collected in the treatise just referred to, and in the voluminous notes upon the case of *Chandelor v. Lopus*, 1 Smith's Lead. Cas. 238. It does not seem to me expedient further to refer, on this point, to the books, contenting myself with the single observation that the before-cited case of *Hawkins v. Pemberton*, 51 N. Y. 198; 10 Am. Rep. 595, is in all respects applicable to the facts now present.

Resorting, then, to the principle and test just propounded, it is manifest that the judgment of the Supreme Court cannot be disturbed. The Court of Common Pleas, in weighing the evidence, had a right to infer that a warranty of the character of the article sold was within the understanding of the contracting parties. The seller in this case asserted, at the time of the sale, that the seed was of the species which the vendee was in search of. When he made this express assertion, he was aware that the vendee could have no opinion for himself on the subject, for the case states that the seed could not be distinguished by sight or touch. The vendee also knew that the vendor could not be stating the result of his own observation. The facts do not admit of the imperative inference that the assertion of the vendor was mere commendation of his goods, or even that it was the utterance of his view as an expert. If the seller had stated the exact truth, he would have said that he had bought the seed as seed of the specified kind, but that he did not know whether it was so or not. Instead of doing this, he made the positive assertion in question. From such an assertion, under the circumstances in evidence, I think the court, although it was not bound so to do, had the right to infer that there was a warranty.

The second question raised in the cause respects the measure of damages. The rule applied in the court below made the plaintiff whole, as he was allowed to recover the difference between the value of the crop produced and the crop which would have been produced if the seed had been answerable to the warranty. This embraces profits, and the contention was, that profits are too remote and uncertain to constitute an ingredient in the recompense which the law gives on a breach of contract.

But this argument comprises a latitudinarian and incorrect statement of the legal rule. Profits sometimes are not, in a legal point of view, either remote or uncertain. Where the situation of the parties is such that, supposing their attention to have been directed to the contingency, they must have perceived, at the time of the making of the contract,

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that its breach would probably result in the loss of definite profits, such profits being of an ascertainable nature, the compensation which the law affords to the injured party will embrace these profits. The leading case on this subject, and one which was approved of in this court in *Breninger v. Crater*, 4 Vroom, 513, in that of *Hadley v. Bazendale*, 9 Exch. 341. The action was for the non-performance of a contract, and the rule is thus defined by the court: "We think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be either such as may fairly and substantially be considered as arising naturally — i. e., according to the usual course of things — from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was ~~actually made were communicated by the plaintiff to the defendant, and thus known to both parties~~, the damages resulting from the breach of such contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

The rule thus stated has been approved of and followed in a numerous series of decisions by both the English and American courts, as is abundantly shown by Mr. Sedgwick in his valuable work on Damages, page 79 (sixth edition).

The present case falls clearly within the scope of this principle. The defendant at the time of the sale was possessed of all the facts — he knew the business of the plaintiff, and the use to be made of the thing sold. He was in a situation to foresee, with entire certainty, the loss that would fall upon the plaintiff if the warranty should be broken. Nor are the gains which have been lost subject to any uncertainty. The seed sold was planted and came to maturity; the seed stipulated for would have done the same, only the value of the product would have been, to a definite amount, greater. In such an injury there is nothing speculative or contingent. There are a number of authorities which sanction the recovery of profits of a much more uncertain character than these. *Davis v. Talcot*, 14 Barb. 611; *Griffin v. Colver*, 16 N. Y. 489; *Borries v. Hutchinson*, 18 C. B. (N. S.) 445; *Messmore v. N. Y. Shot and Lead Co.*, 40 N. Y. 422.

The judgment should be affirmed.

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For affirmance—THE CHANCELLOR, CHIEF JUSTICE, REED, SCUDDER, VAN SYCKEL, WOODHULL, CLEMENT, DODD, GREEN, LILLY—10.

For reversal—DIXON, KNAPP—2.

NOTE.—In *White v. Miller*, 7 Hun, 427, the plaintiffs were market gardeners at Greenbush, in the county of Rensselaer, and the defendants were the trustees of the Mutual Society, called Shakers. The action was brought to recover damages for a breach of contract—on the following facts. In the fall of 1867, one of the defendants, to whom was assigned the duty of selling the seeds raised by the society, informed the plaintiffs that the defendants had raised some "Bristol cabbage seed," the same that the plaintiffs had had that year, and advised them to come for it early. In the spring one of the plaintiffs went to the defendants' seed store and ordered among other seeds named in a catalogue shown him, six pounds of "large Bristol cabbage seed." The seeds were sent to the plaintiffs, one package being marked "Large Bristol Cabbage," and the bill accompanying had one item as follows: "Six pounds large Bristol cabbage, thirty-six dollars." The referees found that the seed was not genuine "large Bristol cabbage seed;" that it was raised by the defendants upon stocks of Bristol cabbage, which the defendants had planted in the vicinity of other cabbage; that the pollen produced by flowers of such other varieties had been carried to a large portion of the flower of the Bristol cabbage stocks which were fertilized thereby; that in consequence thereof this seed was impure and not genuine Bristol cabbage seed, and that although properly cultivated did not produce Bristol cabbage. The court held that there was an implied warranty that the seeds were large Bristol cabbage seed; that there was a breach of the warranty and that the measure of damages was the difference between the value of the crop raised, and what might have been raised had the seed been genuine, citing as authority for such rule, *Passenger v. Thorburn*, 34 N. Y. 634; *Milburn v. Bellon*, 59 id. 53; *Messmore v. N. Y. Shot and Lead Co.*, 40 id. 422; *Flick v. Wetherbee*, 20 Wis. 332; *Wolcott v. Mount*, 36 N. J. 362.

In Connecticut, in an action for a breach of warranty on the sale of seed that it was 'fresh and warranted to grow,' it was held that the measure of damages was the cost of the seed, the value of the labor in preparing the ground for it and in planting it, and the interest on these sums, less the general benefit of the labor to the land. *Ferris v. Comstock*, 33 Conn. 513.—*REP.*

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

FAUSLER V. PARSONS.

(6 W. Va. 486.)

Register of voters — liability of.

A board of registration of voters were required by statute to erase from the list of registered voters the name of any person proved on a hearing, had after notice to him, to be disqualified. *Held*, that the board in performing this duty acted judicially, and that a voter could maintain no action against them for wrongfully erasing his name without showing that they failed to give him the notice required by law.

ACTION of trespass on the case from the Circuit Court of Tucker county. The plaintiff avers in his declaration that, at the time of the commission of the several grievances by the defendant, he was a white male citizen of the State, twenty-one years of age, that he had then been a resident of the State for a year, and of the county of Tucker for thirty days, that he had been, by the duly appointed registrar of Black Fork township, registered as a voter, and that he was then and there duly qualified to vote.

“And thereupon the plaintiff further says, that the said defendants having theretofore been duly appointed and constituted the Board of Registration for the county of Tucker, of the State aforesaid, and having theretofore taken upon themselves the duties of said Board, the said defendants, intending to injure and disgrace as an alien the said plaintiff, who, the said plaintiff, was then and long before duly qualified to vote in

the township of Black Fork, of the county and State aforesaid, they, the said defendants, did, and each of them did, as members of the said board as aforesaid, on the — day of —, 1866, at the county aforesaid, willfully, unlawfully, knowingly, maliciously, and corruptly, and without sufficient cause, exclude and erase the name of the plaintiff from the list of registered voters within the said township of Black Fork, of the county and State aforesaid, said list of registered voters having been made according to the law in such case made and provided, and by the duly appointed Registrar in and for the said township of Black Fork, in which list of registered voters was the name of the plaintiff, having been duly and rightfully registered therein, by which said exclusion and erasure, made willfully, unlawfully, knowingly, maliciously, and corruptly, and without sufficient cause as aforesaid, the plaintiff was, in the said township of Black Fork at the general election held therein on the fourth Thursday (the 25th day) of October, 1866, deprived of the right to vote, he there and then, at said election, desiring to vote, to his, the said plaintiff's, great ignominy and disgrace among the good and loyal citizens of the county of Tucker and State of West Virginia, and to the damage of the plaintiff ten thousand dollars.

The declaration contained several other counts, but they need not be considered.

The defendants demurred to the declaration and to each count thereof, and the court sustained the demurrer.

MOORE, J. The plaintiff, on the first day of January, 1867, sued out of the clerk's office of the Circuit Court of Tucker county, a summons against the defendants to answer him of a plea of trespass on the case. The cause having been remanded to rules with leave to file an amended declaration, the plaintiff, on the first Monday in February, 1868, at rules, filed his amended declaration. On the third day of March, 1869, in term of court, the defendants demurred generally to the amended declaration, and to each count thereof. Demurrer was sustained by the court, and the plaintiff has appealed from that judgment.

The question submitted by argument in support of the demurrer is "Whether judicial officers, or officers performing judicial duties and acts, are liable to be sued for such acts."

The solution of the question depends on the kind of officers and their jurisdiction.

In the case of *Bradley v. Fisher*, 13 Wall. 335, it was held that judges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in

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excess of their jurisdiction and are alleged to have been done maliciously or corruptly. In that case, Mr. Justice FIELD, in delivering the opinion of the court (p. 354), said: "The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed."

Judge COOLEY, with his usual correctness in eliminating authorities, in his most excellent work on Constitutional Limitations, p. 405, *et seq.* and notes, says: "Some courts are of general jurisdiction, by which is meant that their authority extends to a great variety of matters; while others are only of special and limited jurisdiction, by which it is understood that they have authority extending only to certain special cases. The want of jurisdiction is equally fatal in the proceedings of each; but different rules prevail in showing it. It is not to be assumed that a court of general jurisdiction has in any case proceeded to adjudge upon matter over which it had no authority; and its jurisdiction is to be presumed, whether there are recitals in its records to show it or not. On the other hand, no such intendment is made in favor of the judgment of a court of limited jurisdiction, but the recitals contained in the minutes of proceedings must be sufficient to show that the case was one which the law permitted the court to take cognizance of, and that the parties were subjected to its jurisdiction by proper process."

"There is also another difference between these two classes of tribunals in this, that the jurisdiction of the one may be disproved under circumstances where it would not be allowed in the case of the other. A record is not commonly suffered to be contradicted by parol evidence; but wherever a fact showing want of jurisdiction in a court of general jurisdiction can be proved without contradicting its recitals, it is allowable to do so, and thus defeat its effect. But in the case of a court of

special and limited authority, it is permitted to go still further, and to show a want of jurisdiction even in opposition to the recitals contained in the record."

"No person is liable in a civil action for what he has done as a judge, while acting within the limits of his jurisdiction. *Burnham v. Stevens* 33 N. H. 247. But it is to be further remarked, that, if persons having a *special* or *limited* judicial authority, do any act beyond the scope of their authority, they make themselves trespassers." *Blood v. Sayre*, 17 Vt. 600. * * * * *

"The general rule of law, as to actions of trespass against persons having a limited authority, is plain and clear. If they do any act beyond the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such an action. *Doswell v. Impey*, 1 B. & C. 169; acc. *Miller v. Seare*, 2 W. Bl. 1141." Hilliard on Torts, 186.

And this is upon the principle, that judicial protection extends to all judicial tribunals, and is necessary to promote the independence and firmness of the judiciary which must guard and protect, within due bounds, the life, liberty and property of the citizen, as also the rights of the State. In the language of Chief Justice KENT, "No man can see the disastrous consequences of a precedent in favor of such a suit. Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon every thing sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty."

It seems, therefore, settled that where the subject-matter and the person are within the jurisdiction of the courts, the judge, whether of a superior or inferior court, is not subject to a civil action for any matter done by him in the exercise of his judicial functions. "He is not bound, at the peril of an action for damages, or personal controversy, to decide right, in matter either of law or fact; but to decide according to his own convictions of right, of which his recorded judgment is the test, and must be taken to be conclusive evidence. Such, of necessity, is the nature of the trust assumed by all on whom judicial power, in greater or lesser measure, is conferred. This trust is fulfilled when he honestly decides according to the conclusions of his own mind in a given case, although there may be great conflict of evidence, great doubts of the law, and

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when another mind might honestly come to a different conclusion, * * * *. Now it is manifest that to every controversy there are two sides, and that a decision in favor of one must be against another. And this may extend to every interest which men hold most dear ; to property, reputation and liberty, civil and social ; to political and religious privileges ; to all that makes life desirable, and to life itself. If an action might be brought against the judge by a party feeling himself aggrieved, the judge would be compelled to put in issue facts in which he has no interest, and the case must be tried before some other judge, who, in his turn, might be held amenable to the losing party, and so on indefinitely. If it be said that it may be conceded that the action will not lie unless in a case where a judge has acted partially or corruptly, the answer is, that the losing party may always aver that the judge has acted partially or corruptly, and may offer testimony of by-standers or others to prove it ; and these proofs are addressed to the court and jury, before whom the judge is called to defend himself, and the result is made to depend not upon his own original conviction, the conclusion of his own mind in the decision of the original case, as by the theory of jurisprudence it ought to do, but upon the conclusions of other minds, under the influence of other and different considerations." 2 Hilliard on Torts, 171, 172. If it is a judicial act, done within his jurisdiction, he should not be called upon to answer for it elsewhere in a civil action ; and, " these rules extend as well to a justice of the peace as to any other judicial officer, acting within his jurisdiction, in a judicial capacity." 2 Hilliard on Torts, 180, and note ; and extends to jurors, because they act judicially in judging the facts ; as held by the Court of King's Bench in the case of *Groenvelt v. Burwell*, 12 Mod. 386 ; 1 Salk. 396, and 1 Ld. Raym. 459, cited in opinion of Kent in case of *Yates v. Lansing*.

Chief Justice DUVALL, in delivering the opinion of the court in *Chrisman v. Bruce*, 1 Duvall (Ky.), 66, says : " The courts of Massachusetts, and perhaps of some of the other States, have adhered to the doctrine of the English cases, which decide that an action is maintainable against officers who preside at an election for refusing the vote of a qualified voter, even though they may have exercised an honest and fair judgment on the question before them." But the learned judge adds, that the Court of Appeals of Kentucky " has, however, adopted a more equitable and consistent rule, and which more adequately protects such officers in the faithful discharge of their duties. In passing upon the qualifications of a person offering to vote, the judge of the election acts judicially, and is not unfrequently called upon to determine legal ques-

tions of great difficulty and doubt. To hold him responsible, in such cases, for a mere error of judgment by which a citizen may have been illegally deprived of his right to vote, would be unjust in principle and unwise in policy; for the natural result would be to deter honest and capable men from accepting an office attended with such hazards. Hence, in the case, *Morgan v. Dudley*, 18 B. Monr. 711, the rule was distinctly announced and acted upon: "That, as every human tribunal was liable to err, no judge, even of the most inferior one, should be held responsible for a mere error of judgment committed in the regular discharge of his official duties, and that, although the judge of an election may err in determining upon the legality of a vote offered to be given, and thus reject a legally qualified voter, yet if the decision was the result of a mere error of judgment, and was not induced by improper motives, no action can be maintained on account of such erroneous decision."

"But this doctrine, whilst it thus affords protection to the officer in the honest discharge of official duty, does not deny redress to the citizen, who has been willfully and knowingly deprived of his right to vote. It is an invaluable right. As was said by Lord HOLT in a celebrated case, 'a right that a man has to give his vote at the election of a person to represent him in Parliament, there to concur in the making of laws which are to bind his liberty and property, is a most transcendent thing.' *Ashby v. White*, 2 Raym. 950. Here, it is the fundamental right; all other rights, civil and political, depend on the free exercise of this one, and any material impairment of it is, to that extent, a subversion of our political system. Hence the care with which any invasion of this right, from every possible source, has been guarded against."

It is true there are a number of authorities sanctioning civil actions against election officers and selectmen, where they have acted corruptly, or knowingly and unlawfully refused to register a voter, or receive his vote, but in nearly all the cases they have been regulated by statute or Constitution; and the decision in such cases turned upon that fact. The most of the cases cited in 2 Rob. (New) Practice, 575, 576, were of that class; so was the case of *Gordon v. Farrar et al.*, 2 Dougl. (Mich.) 411. Other cases were where they acted without jurisdiction, and thus became usurpers and trespassers.

We now recur to the question before us, did the defendants act in a judicial capacity in erasing the name of plaintiff from the register of voters?

It was made the duty of the County Board of Registration, by ch. 87, § 8, acts 1866, to examine the Registrar's book; section also declared: "And if they are satisfied that any person has been registered who has

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been guilty of any of the acts enumerated in the affidavit contained in the third section of this act, or is in any way disqualified to vote, under the provisions thereof, it shall be the duty of the said board, upon proof of any such act or disqualification, to exclude the name of such person from the list of registered voters. But the party whose name is proposed to be excluded shall have due notice of the time and place of taking the evidence to prove his disqualification, which evidence he shall have the right to rebut, and shall have his name restored to such list if improperly stricken therefrom."

There certainly can be no question that the defendants acting under that section, and passing upon the right of a party to be registered or not, acted judicially; and if they acted within their jurisdiction, as required by the statute, they are not amenable to the plaintiff in a civil action. But if they exceeded their jurisdiction and did not comply with the requisitions of the statute, but erased the name of the plaintiff from the register of voters, without giving him due notice of the time and place of taking the evidence, etc., or refused him the right to rebut the evidence, it would have been a usurpation of authority, and such a violation of law as to have made them trespassers, and amenable in an action, by the plaintiff, for damages; because their authority was prescribed and limited by the act of the legislature, and they had no right to exceed that limit, but acted without jurisdiction, and

Therefore, I am brought to the conclusion, that the allegations in the declaration are not sufficient in law. The mere allegations of "*willfully, unlawfully, knowingly, maliciously and corruptly, and without sufficient cause, exclude and erase the name of the plaintiff, etc.,*" do not make the declaration good, but the declaration must show by allegation how the defendants acted "*willfully,*" "*unlawfully,*" "*corruptly,*" etc. Did they erase his name without giving him the notice required? Did they erase it without complying with the requirements of the statute? Did they act without jurisdiction? If so, the declaration should so allege; otherwise the court will presume they acted within their *jurisdiction and judicially*, and will refuse to take jurisdiction of a case against them for mere error of judgment.

The demurrer was properly sustained.

HAYMOND, President, and HOFFMAN and PAULL, Judges, concur in the foregoing opinion.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

DALRYMPLE v. HILLENBRAND, appellant.

(62 N. Y. 5.)

Indorsement — indorser estopped from disputing signature, Bankruptcy — fraudulent preference.

The indorser of a copartnership note impliedly contracts that it was made by the copartnership firm in whose name it was executed, and he cannot deny the fact when sued upon the indorsement.

A bankrupt gave to a creditor his note indorsed by a third person. *Held*, not a fraudulent preference, as the advantage secured by the creditor was not out of the bankrupt's estate.

ACTION against defendant as an indorser of a promissory note, alleged to have been made by the firm of "Altenbrand Bros.," dated April 24, 1872, for \$1,000, payable twelve months from date, and delivered to the firm of "Chamberlain Bros.," and sold and transferred by them before maturity to plaintiff. The answer denied that the alleged makers of the note were partners, and alleged that they had been, prior to the making of the note, partners, but had been adjudicated bankrupts; that the note was made for their accommodation without consideration to defendant and to evade the bankrupt act and to induce Chamberlain Bros. to forbear opposing an application for their discharge.

The referee found the making of the note as alleged in complaint, the indorsement thereof by defendant at the request of the makers, the delivery to Chamberlain Bros. and the transfer by them for value, before

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maturity, to plaintiff. Also, that in December, 1871, the firm of Altenbrand Bros. were insolvent, and called a meeting of their creditors, at which the agent and attorney in fact of Chamberlain Bros. attended; that the creditors of said firm of Altenbrand Bros. appointed a committee to examine the affairs of said firm, of which committee said agent was a member and chairman, and as such reported that the assets of the firm would not pay more than twenty-five cents on the dollar of their indebtedness, and recommended the creditors to accept that sum, and release the firm, but that such recommendation was not until after the note in suit was given, and was not, so far as appeared upon the trial, made with the knowledge or approval of Chamberlain Bros. That on the 15th day of January, 1872, a petition was filed in the United States District Court, by creditors of said firm, to have the members thereof declared bankrupts, and on the 16th day of February, 1872, under said proceedings they were declared and adjudged bankrupts. That said Chamberlain Bros. and their agents knew of the alleged insolvency and bankruptcy prior to the making of said note, and that said Altenbrands were, in fact, adjudicated such bankrupt at the instigation of said Chamberlain Bros. and their agent. That the consideration of said note was a past due indebtedness of said Altenbrand Bros. to said Chamberlain Bros. That the claim of Chamberlain Bros. against the makers was, at the delivery of this note, transferred to the defendant. That defendant indorsed said note, upon the express understanding that he was not to be liable on said note as such indorser, unless said Altenbrand Bros. effected a compromise with all of their creditors, but that such understanding was solely between the defendant and the Altenbrands, and was never communicated to Chamberlain Bros. or their agents.

As conclusion of law the referee found that the plaintiff was entitled to judgment for the amount of the note, which was rendered accordingly. Defendant's counsel requested the referee to find, among other things, that the note was made and delivered for the purpose of enabling Altenbrand Bros. to evade the bankrupt act and with the intent to give Chamberlain Bros. a preference over other creditors and to induce them to forbear opposing their discharge. This the referee refused to find. Further facts appear in the opinion.

A judgment in favor of the plaintiff was entered upon the report of a referee which was affirmed by the Supreme Court.

D. Noble Towan, for appellant.

Samuel Hand, for respondent.

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ANDREWS, J. Assuming that the adjudication in bankruptcy operated as a dissolution of the firm of Altenbrand Bros., and that thereafter no authority was given by Louis to Henry Altenbrand to execute the note in suit in the name of the firm, the finding of the referee that the note was made by the firm cannot be supported. But this finding was immaterial, and does not affect the right of the plaintiff to recover. The defendant, by indorsing the note, impliedly contracted that it was made by the copartnership firm in whose name it was executed, and he cannot deny the fact when sued upon the indorsement. *Erwin v. Downs*, 15 N. Y. 575; *Remsen v. Graves*, 41 id. 471; *Turnbull v. Bowyer*, 40 id. 456.

The principal question made upon this appeal is, that the note is void by force of section 83 of the bankrupt act of March 2, 1867. That section declares that "any contract, covenant or security made or given by a bankrupt, or other person, with or in trust for any creditor for securing the payment of any money, as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void." The referee finds that the defendant indorsed the note at the request of the makers, who delivered it to Chamberlain Bros., and that it was by that firm transferred to the plaintiff for value before due.

Altenbrand Bros. were indebted to Chamberlain Bros. for malt purchased in December, 1871, and on the 16th day of February, 1872, Altenbrand Bros. were adjudged bankrupts in proceedings taken on the petition of other creditors of the firm, filed January 15, 1872. When the note in question was given, the proceedings in bankruptcy were pending. If the note was given upon the consideration, or with the intent specified in the section of the bankrupt act referred to, it was void in the hands of the plaintiff, although he is a *bona fide* holder of the instrument, as no reservation or exception is made in favor of innocent holders of negotiable securities made in violation of the law. It is unnecessary to determine the question. Whether the note was given upon the consideration, or with the intent specified in this section, was a question of fact, upon which there was evidence given upon the trial, but there is no finding of the referee in respect to it. The referee was requested by the defendant to find that fact in his favor, and he refused. To this refusal there is an exception, but it is well settled that an exception to a refusal of a referee to find a fact in issue, presents no question for review in this court, unless the fact which he was requested to find was conclusively proved. *Van Slyke v. Hyatt*, 46 N. Y. 260; *Lefler v. Field*, 47 id. 408; *Morgan v. Mulligan*, 50 id. 665; *Rogers v. Wheeler*, 52 id. 263.

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This cannot be said in respect to the fact in question. The note was given on account of the debt to Chamberlain Bros. The bankruptcy proceedings against Altenbrand Bros. were taken adversely to them by creditors, and at a time when they were endeavoring to effect a compromise of their debts. Chamberlain Bros. afterward procured the adjudication to be made upon the petition which was filed without their privity, and there is no evidence that they sought to coerce Altenbrand Bros. to give the note in suit by refusing to sign the compromise and threatening to prosecute the proceedings in bankruptcy.

That there was any promise or intent to forbear opposing the discharge of the bankrupts is denied by the agents who acted for them, and this intention is not a necessary inference from their conduct.

The position taken that the giving by Altenbrand Bros. of their note indorsed by the defendant, for the debt to Chamberlain Bros., was a fraudulent preference within the bankrupt act, is not tenable. The law provides for an equal distribution of the estate of a bankrupt among his creditors, and an attempt to appropriate it in violation of the principle of equality among creditors, is a violation of the act. But the transaction in question was not an appropriation of the assets of Altenbrand Bros. to the use of Chamberlain Bros. They secured an advantage, because the bankrupts were willing and were able to procure the defendant's indorsement for their benefit, but it was not an advantage secured out of the estate of the bankrupt. Their assets were not diminished; there was no pledge or transfer of any part of their property, and their liabilities were not increased.

The counsel for the defendant, on the argument, insisted that the note was used by Altenbrand Bros. in violation of a condition imposed by the defendant when his indorsement was made, that a compromise should be first obtained with all their creditors, and it was also insisted that the note was given by the makers to Chamberlain Bros. upon a secret agreement in fraud of the compromise, which had been entered into by them with the other creditors. There are two answers to these positions: first, neither of these defenses were pleaded; and, second, admitting the facts charged to be true, they are not available to defeat a recovery by the plaintiff, who stands upon the record as a *bona fide* purchaser of the note before maturity. It was shown, affirmatively, that he paid full value for it, and it was not shown that he had notice of the unauthorized use of the paper, or of any fraud committed by Chamberlain Bros. in respect to the compromise. The burden of proving notice was upon the defendant. Byles on Bills, 118.

There were exceptions taken to the rulings of the referee in admitting
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and rejecting evidence, many of which are unimportant in view of the disposition made of the main question in the case.

We have carefully considered them, and are of opinion that no error was committed by the referee which calls for a reversal of the judgment.

The judgment should be affirmed.

All concur.

Judgment affirmed.

MAGNIN v. DINSMORE, appellant.

(62 N. Y. 35.)

Express company — limitation of liability — duty of shipper to state value. Measure of damages.

Plaintiff delivered goods for carriage to defendant's express company and received a receipt containing a provision exempting defendant from liability beyond fifty dollars for loss of the goods, unless their value was stated by the shipper. *Held*, that mere silence on the part of the plaintiff as to the real value of the goods, although there was no inquiry by the carrier and no artifice used to deceive, was fraud in law and relieved the carrier from liability for a loss of the goods beyond the fifty dollars.

Where goods are sent to a consignee with an option to take them at a price stated or to return them, the measure of damages for their loss by a carrier is the price fixed with interest from the day the goods would in the ordinary course of transportation have reached the consignee.

ACTION brought against defendant, as president of the Adams Express Company, to recover the value of a package of watches and watch-keys delivered to that company for transportation, consigned to J. E. Merriman & Co., Memphis, Tennessee.

The receipt given by the company contained this clause: "If the value of the property above described is not stated by the shipper, the holder hereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss or detention of or damage to the property aforesaid." Plaintiffs sent to the consignee a bill of the goods with prices, amounting in all to \$1,491.50, accompanied by a letter advising of the shipment to them for selection. Plaintiff's evidence tended to show that the goods were not delivered, but that the box which contained them was afterward found empty at Gowanus, Long Island, and that their value in Memphis would have been from \$2,300 to \$2,500. No statement of value was made at the time of shipment. Defendant

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gave evidence tending to show that a greater price would have been charged for transportation had the true value been stated ; also that the package would have been put in the money and valuable package department, the packages in which were transported in safes locked and sealed, while where no value was stated it went in the freight department where such precautions were not taken. Defendant's counsel requested the court to charge that it was plaintiffs' duty, at the time of the delivery of the package, under the terms of the contract, to state its value, if they desired, in case of loss, to recover over fifty dollars; that the non-disclosure was a fraud on the company which prevented a recovery. The court refused so to charge and defendant's counsel duly excepted. The court submitted to the jury the question as to whether, in fact, there was any fraud or concealment ; and also charged, in substance, that the measure of damages was the value of the package at the place of destination, to which defendant's counsel duly excepted.

Further facts appear in the opinion.

The plaintiffs had a verdict, and the judgment entered thereon was affirmed by the Supreme Court.

Chas. M. Da Costa, for appellant. The goods being of greater value than the amount specified in defendant's receipt, plaintiffs' silence as to their real value, although there was no inquiry by defendant and no attempt to deceive, was a fraud in law which discharged defendant from liability for ordinary negligence. *Tyly v. Marrice*, Carth. 458 ; *Gibbon v. Paynton*, 4 Burr. 2298 ; *Clay v. Willan*, 1 H. Black. 298 ; *Izett v. Mountain*, 4 East, 371 ; *Nicholson v. Willan*, 5 id. 507 ; *Harris v. Packwood*, 3 Taunt. 264 ; *Bignold v. Waterhouse*, 1 M. & S. 255 ; *Alfred v. Horne*, 3 Stark. 136 ; *Down v. Fromont*, 4 Camp. 40 ; *Beck v. Evans*, 16 East, 244 ; *Batson v. Donovan*, 4 B. & Ald. 21 ; *Duff v. Budd*, 6 Moore, 469 ; *Brooke v. Pickwick*, 4 Bing. 220 ; *Sleat v. Flagg*, 5 B. & Ald. 342 ; *Thorogood v. Marsh*, Gow. 105 ; *Ellis v. Turner*, 8 T. R. 531 ; *Birkett v. Willan*, 2 B. & Ald. 356 ; *Bodenham v. Bennett*, 4 Price, 31 ; *Hinton v. Dibbin*, 2 Q. B. (Ad. & El.) (N. S.) 646 ; *Peek v. N. S. R. Co.*, 10 H. of L. Cas. 499, 511, 514 ; *Orange Co. Bk. v. Brown*, 9 Wend. 88, 115 ; *Pardee v. Drew*, 25 id. 459-461 ; *Richards v. Westcott*, 2 Bosw. 589-605 ; S. C., 7 id. 6 ; *G. N. R. Co. v. Shepherd*, 14 F. L. and Eq. 367-370 ; *Warner v. W. Tr. Co.*, 5 Robt. 490 ; *Stoneman v. Erie R. Co.*, 52 N. Y. 429, 438. The facts of the case and not the plaintiffs' intent constituted the fraud. *Mason v. Lord*, 40 N. Y. 476, 484 ; *Hackford v. N. Y. C., etc., R. R. Co.*, 53 id. 654 ; *Appleby v. Astor Ins. Co.*, 54 id. 253 ; *Getty v. Devlin*, id. 404 ;

Richards v. Wescott, 7 Bosw. 6. Plaintiffs' negligence could not be cured by negligence on the part of defendant. *Shope v. Webb*, 1 T. R. 734. No title to the goods passed to Merriman & Co. *Thompson v. Fargo*, 49 N. Y. 188. Plaintiffs could recover as damages only the invoice price of the goods, or the market value in New York. *Bridge v. Austin*, 4 Mass. 115; *Lakeman v. Grinnell*, 5 Bosw. 632. Declarations of agents to bind their principals must be made not only during the continuance of the agency, but at the very time of the transaction in question. *Anderson v. R., W. and O. R. R. Co.*, 54 N. Y. 334; *Penn. R. R. Co. v. Books*, 57 Penn. 339; *Sweatland v. Tel. Co.*, 27 Iowa, 433; S. C., 1 Am. Rep. 285; *Pratt v. O. and L. C. R. R. Co.*, 102 Mass. 557; *N. W. U. P. Co. v. Clough*, 11 Alb. L. J. 15.

C. Bainbridge Smith, for respondents. Defendant was bound to prove that the loss occurred from causes by which he exempted himself from liability. *So. Ex. Co. v. Moon*, 3 Mo. 822; *Simmons v. Law*, 3 Keyes, 217. A failure to deliver by a common carrier is *prima facie* evidence of negligence. *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 185; *Bostwick v. B. and O. R. Co.*, id. 712; *Lamb v. C. and A. T. Co.*, 46 id. 271; *Curtis v. R. and Syr. R. Co.*, 18 id. 534; *Mann v. Page*, 40 Vt. 826; *Turney v. Wilson*, 7 Yerg. 340; *Whiteside v. Russell*, 8 W. & S. 44; *N. J. S. Nav. Co. v. Mer. Bk.*, 6 How. 423; *R. R. Co. v. Lockwood*, 17 Wall. 357. So far as the contract of a common carrier is special the common-law liability is qualified, but in all other respects it remains. *Simmons v. Law*, 3 Keyes, 217; *Guillaume v. Ham. and P. Co.*, 42 N. Y. 212; *Steinweg v. Erie R. Co.*, 43 id. 123; *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11; Story on Bail, § 557; Ang. on Com. Car., § 220. If the loss was occasioned through defendant's negligence he was answerable for the whole value of the goods. *Wescott v. Fargo*, 6 Lans. 319; *Am. Ex. Co. v. Sands*, 55 Penn. 140; *Kallman v. U. S. Ex. Co.*, 8 Kans. 205; *So. Ex. Co. v. Newby*, 36 Ga. 635; *Adams Ex. Co. v. Haynes*, 46 Ill. 89; *Vroman v. Am. M. U. Co.*, 5 N. Y. Sup. 22. No presumption will be indulged in favor of common carriers exempting them from common-law liability. *Edsall v. C. and A. Co.*, 50 N. Y. 661; *Wescott v. Fargo*, 6 Lans. 328; *Hooper v. Wells*, 27 Cal. 11. If the loss occurred through gross negligence, the notice did not exempt defendant from liability for the whole value of the goods, although plaintiffs did not disclose their value. *Batson v. Donovan*, 4 B. & Ald. 21; *Sleat v. Flagg*, 5 id. 342; *Garnett v. Willan*, id. 53; *Duff v. Budt*, 6 Moore, 469; *Brooks v. Pickwick*, 4 Bing. 220; *Brodenham v. Bennett*, 4 Price, 81; *Ellis v. Turner*, 8 T. R. 531; *Beck v. Evans*, 16 East, 244; *Edwards*

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on Bail, 483, 484. The measure of damages is the value of the goods at their place of destination where they should have been delivered. *Sturges v. Bissell*, 46 N. Y. 462; *Ward v. N. Y. C. R. R. Co.*, 47 id. 29; 8 Pars. on Cont. 196.

FOJAGER, J. There was a contract between the plaintiffs and the defendant, that if they did not state to it the value of the property shipped, they would not demand of it a sum exceeding fifty dollars for the loss or detention thereof. *Magnin v. Dinsmore, Prest., etc.*, 56 N. Y. 168. This contract did not, *per se*, excuse the defendant from liability for a loss arising from its negligence. *Id.* Thus we have heretofore held in this case.

At the trial, the rulings in which are now under review, the jury found negligence in the defendant, and that the loss arose therefrom. The judgment of the court above cited as to legal liability, and the finding of the jury as to the facts, have thus concurred in favor of the plaintiffs. But the judgment of the court then given was only upon the questions then presented. Other questions now arise. The defendant now insists that the imposition and deceit upon it, of the plaintiffs, amounting to fraud, relieved it from liability for the loss. It was the duty of the plaintiffs not to practice imposition and deceit upon the defendant so as to add to its risk and to lessen its care and diligence. *Orange County Bk. v. Brown*, 9 Wend. 116. Though the duty of a common carrier, and the rigorous liability which is upon him at common law, arises principally from the public employment which he exercises (*Coggs v. Bernard*, 2 Ld. Raym. 917, 918; per Lord HOLT, C. J., in *Lane v. Cotton*, 12 Mod. 485; Story on Bailm., § 549); yet his hire and reward also enter therein, and he has a right that his compensation shall be in measure with the risk he takes, and that he shall not be subject to unknown hazards. 9 Wend., *supra*. The defendant insists that there was fraud wrought upon it by the plaintiffs, in their failure to disclose the real value of the package and the nature of the contents; that the silence of the plaintiffs, and the alleged deceptive form, dimensions and general appearance of the package, were an imposition and deception. A shipper may become chargeable with fraud upon a carrier, through imposition and deception, as well when he is silent as when he speaks that which is untrue. A neglect to disclose the real value of a package, and the nature of its contents, if, therewith, there is that in its form, dimensions and other appearance designed, and even if not designed, if fitted, to throw the carrier off his guard, will be conduct amounting to the fraud now spoken of. The intention to impose upon the carrier is not material;

it is enough if such is the practical effect of the conduct of the shipper. *Pardee v. Drew*, 25 Wend. 459. This question, too, was passed upon by the jury, at the last trial, as one of fact. Under the instructions of the court they found that there was not, upon the part of the plaintiffs, either active fraud or concealment, neither in the way in which the parcel was delivered to the carrier, nor in what was said or left unsaid at the time of the delivery, nor in the character of the package, as to the way in which it was inclosed and sealed. The defendant now urges, and did then urge, that the question is not one of fact for a jury, but of law for a court, and that the plaintiff should be nonsuited for concealment of the true value of the package. An examination of the testimony for the facts of the case has brought me to the conclusion that there is no proof of fraudulent concealment of value by the plaintiffs, unless their silence be such concealment. If the claim of the defendant is to be upheld, it is on the ground that silence alone, as to real value, is conclusive evidence of that deception and imposition which works fraud upon a carrier, and relieves him of his liability. Where there is no special contract limiting the common-law liability of the carrier, nor any notice so specially brought home to the knowledge of the shipper as to have that effect, the shipper is not bound to disclose the value of the goods unless he is asked thereof by the carrier; but the carrier (for proper reasons, *Crouch v. L. and N. W. Railway Co.*, 14 C. B. 255) has a right to make inquiry and to have a true answer, and if he is deceived by a false answer given, he will not be responsible for any loss. If, however, the carrier makes no inquiry, and no artifice is used to mislead him, he is responsible for loss, however great may be the value. Such is stated in *Story on Bailments* (§ 567) to be the better opinion, and the cases there cited sustain the text. Where there is a special contract limiting liability, or other thing tantamount thereto, it is otherwise. The case of *Batson v. Donovan*, 4 Barn. & Ald. 21, is, perhaps, the strongest which can be cited, and the reasons for the rule are there well stated. There the shipper knew of the notice given by the carrier, limiting his liability. The package left for carriage was a box, properly directed, and with the name of the owners upon it. I infer that the business of the owners, as bankers, was known to the carrier. The box was locked and corded, though not sealed. It contained bills, checks, and notes, to over £4,000 in value. The carrier did not know what it contained, nor that the contents were of great value; nor was any thing said to him thereof. No more was said to him than: "It is the box for New Castle." These are all the facts stated in the report; but it is not probable that any circumstance is omitted, which would have made for the carrier, or which would have materially changed the aspect

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of the case as presented in the book. The shipper's counsel, *arguendo*, said: "Here is no imputation of fraud; negligence in the plaintiffs or their servants, in not communicating the value of the parcel, is alone insinuated." BEST, J., states his protest "against what I think a new principle in the law relative to carriers, viz.: That the owner of a parcel of value, such parcel having nothing in its appearance indicative of its contents being of small value, is bound, unasked by the carrier, to state what it is worth;" "I cannot consider the non-communication of the contents of a box as any thing like fraud;" "this is a case of silence only." He was the sole dissentient judge, but his statement of the facts is not questioned by those whose opinions prevailed. The case (*Batson v. Donovan*,) must be taken as one of special acceptance by the carrier, and of silence only, as to value, by the shipper. The facts of the case now here cannot be stated any more favorably for the plaintiffs in it, than that there was a special acceptance by the defendant, and that there was only silence on their part. In *Batson v. Donovan*, it is true, the case was left to the jury to say, "whether the plaintiffs dealt fairly by the defendants in not apprising them that the box contained articles of value." But the consideration of the rule *nisi* for a new trial brought up the question, whether, as matter of law, the facts of a limited liability by notice, and of silence as to value, were enough to debar the shipper of a recovery. A majority of the court adjudged that they were; that by delivery without information the shipper held the package out to the carrier as an ordinary article, which he would have no objection to take as of course; that it was the duty of the shipper, not to deliver as ordinary goods, but to inform of nature and value; that in point of law it was a concealment, and fraud and deceit in law, not to do so. Besides, there was a question for the jury, also, whether the defendant was not chargeable with *gross* negligence in their carriage of the parcel. I have dwelt on the case cited, as it is so like this in its facts; as it was much considered by the court, for the dissent was intelligent, vigorous, and persistent, and the judgment not carelessly arrived at; and as it has been often cited at the bar and from the bench, acquiesced in by courts and text-writers, sometimes with and sometimes without hesitation, and seems never to have been reversed or overruled. Seven years afterward the dissenting judge still kept up and expressed his dissent (*Brooke v. Pickwick*, 4 Bing. 218), from which it appears that the adjudication remained then unchanged. Nor was it without precedents, tending strongly to the same end. See *Clay v. Willan*, 1 H. Bl. 298; *Yate v. Willan*, 2 East, 128; *Izett v. Mountain*, 4 id. 371; *Nicholson v. Willan*, 5 id. 507, and others might be cited. It is not too much to say that this

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rule, and certain kindred rules, became so much fixed as the law, by these and other decisions, as to lead to an enactment by Parliament, restoring to some extent the strict operation of the common-law liability, so far as it relates to carriers by land. See Statutes, 11 Geo. IV, and 1 Wm. IV, c. 68. The same principle has been asserted in this State. *Orange County Bk. v. Brown, supra*. There NELSON, C. J., states it thus: "The carrier in such case is not bound to make inquiry, and if the owner omits to make known the value, he is liable only to the amount mentioned in his notice, or not at all, according to the terms of his notice." It is true that in that case the carrier had not given notice to the owner, nor otherwise made express special acceptance. But he was a carrier of passengers only (so far as that owner was concerned), and thus there was a practical limited acceptance, for he was not, in the absence of information of value or nature of the goods committed to him, to be held to a carrier's duty and liability, further than for a traveler's ordinary baggage. *Gt. North. R. W. Co. v. Shepherd*, 14 Eng. L. and Eq. 367. It is true, also, that the case 9 Wend., *supra*, is one of mere silence merely as to value, as the large sum of money, for which it was sought to charge the carrier, was placed in an ordinary travelling trunk, thus, to a degree, making an affirmation of slight value. So that this utterance of the learned judge may not have the force of a binding authority, while it has all the weight which his high judicial repute can give it. It is to be observed, too, that he cites as authority for his assertion *Batson v. Donovan*; *Thorogood v. Marsh*, Niel Gower, 105; and *Marsh v. Horne*, 5 Barn. & Cress. 322. See, also, *Pardee v. Drew, supra*; *Warner v. West. Trans. Co.*, 5 Robt. 490; *Richards v. Westcott*, 2 Bosw. 589; S. C., 7 id. 6. The opinion in *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357-380, recognizes the justice and reasonable character of the rule. Nor is there wanting an analogy in the law for this doctrine. If an applicant for marine insurance, though without design to deceive, and only by failure to mention, conceal a fact which it is material for the insurer to know as increasing the risk he is asked to assume, and thereby affecting the rate of premium which he would charge, the contract of the insurer may be avoided. 2 Duer on Ins. 380, *et seq.* And the reason of the thing is on the same side. As a general rule, the carrier, because of his public employment, must take and carry that which is offered to him therefor. But he ought to have a reasonable reward for the carriage. As the risk of carriage of a parcel of much value is greater than of one of mean value, the reward for it should be greater. And as the risk is greater, so should the care be greater, and so it will be if the value be known. Thus it appears that the carrier

should know of the value of the package which he is called upon to carry, that he may exact his due reward, and take due care. See *Riley v. Horne*, 5 Bing. 217. As has been stated, in the absence of agreement for a limited liability, it is the duty of the carrier to make all needful inquiry as to value. But when the shipper agrees with the carrier for a limited liability, he thereby expresses to the latter his estimate of the risk to be run and of the care needed, and "holds out the package to him as an ordinary article, which he would have no objection to take as of course." The carrier is thereby put off his guard. The shipper might refuse to agree to a limited liability, and demand generally, carriage upon the common law liability of the carrier; and then they deal at arms' length, and that would arouse the attention of the carrier; at least would put upon him the duty of inquiry. But accepting carriage upon the terms of a limited liability, the shipper indicates his judgment of the degree of the risk and of needed care; and his silence as to real value is the same as an assertion of mean value, thus keeping from the carrier his adequate reward; and, what is worse, misleading him as to the degree of care and security which he should provide. It is a concealment of an important fact in entering into the bargain to be made, such a concealment as amounts to a fraud in law upon the carrier; and where there is no dispute as to the material facts, as there is none in this case, it is a question of law for the court, and not of fact for the jury.

I conclude that the defendant is right in its claim, that the question of concealment of value, upon the undisputed facts of the agreement and of the silence of the plaintiffs, was one of law for the court, and not of fact for the jury; and that silence only as to value amounted to such an imposition upon the defendant, as would relieve it from a liability for the total value of the goods, unless something more in its conduct is shown than negligence to carry safely and to deliver promptly. I wish to add here a remark, that when the words "imposition," "deception," "fraud," are used, it is because they are found in the books treating on this matter, and not as imputing to the plaintiffs any motive or design inconsistent with complete mercantile honor and fair dealing. It would be more accordant with the idea meant to be conveyed, to use the language suggested by reputable writers on insurance, and to say that a concealment without design, is a failure to observe an implied condition that the contract for carriage is free from misrepresentation or concealment. 2 Duer Mar. Ins. 647; 1 Phillips on Ins. 279, § 537. It is proper also to add, that while such a concealment, under such a contract as there is in this case, relieves the carrier from liability for a loss occurring from ordinary negligence, we do not now hold that he will be thereby thus

relieved, where his acts or those of his servants have amounted to a misfeasance or abandonment of his character as carrier. *Sleat v. Fagg*, 5 Barn. & Ald. 342.

There are other questions raised by the argument made for the defendant; as to the measure of damages, and as to the admission of evidence. As to the first, it seems clear that the plaintiffs could not demand from the defendant more than would have resulted to them had the defendant made safe carriage and prompt and correct delivery. In that case the plaintiffs would, at the farthest, have had from their consignees payment for all the goods sent at the price to the consignees fixed upon them by the plaintiffs. The sum of that price, with interest thereon from a day when the goods should, in usual course of carriage, have reached the consignees and been accepted by them, will make the damage which would naturally and proximately result to the plaintiffs. Though a rule is sometimes stated thus: That the damages are the value of the goods agreed to be carried and delivered at the place and time of delivery; that the rule is but a branch of the more general one, that the damages for a failure to perform are a sum equal to the benefit which would have resulted from a performance of a contract. *Sturgess v. Bissell*, 46 N. Y. 462. When the owner and shipper of the goods is himself to take the goods at the place of destination, and there sell them for his own account for what they will there bring, the market value there is the measure of his damages, because that would have been his benefit from performance of the contract. But every case is governed by its own facts; and here the price of the goods at the place of destination was fixed by the plaintiffs before they were committed to the carrier. Either that price was to be paid by the consignees or the goods were to have been returned to the plaintiffs at New York, where they would have been worth to them the market-price of them there. No other value to the plaintiffs could have been in the contemplation of both the contracting parties, nor any other damages than such as would result from a failure to obtain that value.

The evidence of the witness Byrd, objected to, seems to be of the declarations of one Woodward. If it be assumed that the latter is shown to have been an agent of the defendant, it does not appear when the declarations were made, or that they were part of the *res gestæ* accompanying the performance of any act or duty as agent. So much of the answer as relates to the declarations of Woodward was improperly received. The objection and exception cover more than this, and somewhat which does not appear objectionable, and perhaps they would furnish no ground of error, for that reason. As, for other causes,

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the judgment must be reversed, it is not of moment to consider them further.

The judgment must be reversed and a new trial ordered.

All concur.

Judgment reversed.

 ROHRBACH v. THE GERMANIA FIRE INSURANCE COMPANY, appellant.

(62 N. Y. 47.)

Fire insurance — insurable interest — description of property — statement as to interest — when company not bound by knowledge of agent.

A married woman, being indebted to her husband, gave him a written acknowledgment of the debt "which shall be a lien on my property," and afterward died leaving insufficient personal assets to pay her debts and but one parcel of land, valuable chiefly for the buildings on it. *Held*, that the husband had an insurable interest in the buildings.

A policy insured plaintiff "on his two buildings." He did not own the buildings, but had an interest in them and was in possession of them. *Held*, not a warranty of ownership, nor a material misrepresentation.

A policy of insurance provided that if the interest of the assured in the property was other than the entire, unconditional ownership, it must be so represented to the company and so expressed in the policy. To the question in the application "Is your title to the property absolute?" the assured answered "His deceased wife held the deed." The assured had only an equitable interest in the property and possession. *Held*, not such a full and true statement of the facts as the condition required, and that the policy was void.

A policy of insurance provided that the agent taking the application should be the agent of the applicant and not of the company under any circumstances whatever. *Held*, that the company would not be bound by the knowledge of the agent acquired when the application was made.

ACTION upon a policy of insurance, by its terms insuring plaintiff upon "his two framed buildings" situate in the village of Jeffersonville, N. Y. Prior to the 28th June, 1868, the plaintiff had been in the employ of Margaretha Hartmann, and she was indebted to him for his labor and services. On that day they intermarried. On the thirtieth of the same month she executed and delivered to him an instrument, in writing, of the body of which the following is a copy :

"JEFFERSONVILLE, June 30th, 1868.

"I do hereby certify that I owe to John Rohrbach the sum of seven hundred dollars ; and, also, twenty-five dollars for each and every month

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from the fourteenth day of July, 1868, and for every month he may live with me henceforth without any deduction whatsoever, which amount shall be a lien on my property."

She died intestate July 8th, 1868, leaving personal property of the value of \$600, and a lot in said village upon which were the buildings in question. The principal value of the premises was in the buildings. One Armbrust was appointed administrator of her estate. Her indebtedness, rather than that to plaintiff, was from \$1,200 to \$1,400. Her indebtedness to him was about \$2,100. Plaintiff continued in the use and occupation of the buildings. In December, 1868, plaintiff negotiated for insurance on the buildings with one Brand, who was the agent of defendant, authorized to procure and submit applications, and to issue policies furnished him by defendant, signed by its officers, which were to be countersigned by him. Plaintiff showed to Brand the said instrument, and related and explained to him all the facts and circumstances. Plaintiff was a German, he could not read or write English. Brand filled out the application, giving, as he testified, his conclusions and the facts he deemed material, and the plaintiff signed it. The material part of the application was as follows :

"Application of John Rohrbach, of Jeffersonville, State of N. Y., for insurance against loss or damage by fire for the period of one year from 26th day of December, 1868, to 26th day of December, 1869, at noon, by the Germania Fire Insurance Company of the City of New York, in the sum of ten hundred dollars, upon the property specified below :

	Cash value.	Sum to be insured.
"On his frame 2-story building, occupied by insured as a dwelling and saloon	\$4,000	\$1,000

"The applicant will answer fully the following question :

"Title — Is your title to the above property absolute? If not, state its nature and amount.

"Ans. His deceased wife held the deed.

"And the said applicant hereby covenants and agrees to and with the said company, that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property to be insured, so far as the same are known to the applicant, and the same is hereby made a condition of the insurance and a warranty on the part of the insured."

The policy contained these clauses, among others :

"I. If an application, survey, plan or description of the property therein insured is referred to in this policy, such application, survey, plan

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or description shall be considered a part of this contract, and a warranty by the assured; and any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in a written application or otherwise, * * * or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy, * * * and in every such case this policy shall be void.

"If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company and so expressed in the written part of this policy, otherwise the policy shall be void.

"II. It is a part of this contract, that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transaction relating to this insurance.

"And it is hereby mutually understood and agreed by and between this company and the assured that this policy is made and accepted in reference to the foregoing terms and conditions, and to the classes of hazards and memoranda printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for in writing."

Other facts appear in the opinion. Defendant's counsel moved for a nonsuit on the ground of breach of warranty, and that plaintiff had not an insurable interest. The motion was denied, and defendant's counsel excepted.

Judgment was entered on a verdict for the plaintiff, and was affirmed by the Supreme Court.

B. C. Chatwood, for appellant.

J. A. Thompson, for respondent.

FOLGER, J. The plaintiff cannot maintain this action, unless he had an insurable interest in the buildings which were the subject of the risk taken by the defendants, and which were destroyed by fire. He seeks to found such an interest, upon the instrument in writing, executed by his wife after her marriage to him.

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Without entering minutely into a consideration of the effect of the marriage upon her pre-existing obligations and liabilities to him, it is sufficient to say that the instrument executed by her was based upon a consideration adequate to uphold her express promise; that though made by a married woman it was in due form to affect her separate estate; and that though a transaction between a wife and her husband, yet equity would have upheld and enforced it in his favor against her, had she lived, and will enforce it against her estate now that she is dead. By it, he was an equitable creditor of her estate, at the time of the insurance; but he was no more than a general creditor. Though the instrument contains the phrase, "shall be a lien on my property," no specific lien was thereby created, and so far as that instrument had effect, no more than a general equitable lien, yet to be enforced and made specific by a judgment in an equitable action. The plaintiff stood thereby in no better plight, so far as having an insurable interest in the buildings, than would have stood a creditor of the deceased wife, who held a judgment only, rendered and docketed against her, which would have become a general lien upon her real property. He did not stand in so good plight, but for other facts now to be mentioned. She had died after giving the instrument, leaving personal and only this real estate; a person other than the plaintiff had taken out letters of administration thereon; the personal estate was by much insufficient to pay the debts against her; and this real estate, including the insured buildings, would in the due course of administration, for a space of at least three years from the granting of letters of administration, be liable to sale for the purpose of meeting her liabilities, and it was the only fund to which the plaintiff could look for payment; the plaintiff was in the possession of the buildings, occupying them at the time of the fire. Judgment creditors, if any, would have had a preference in payment from the personal estate (4 R. S. 87, § 27, subs. 3, 4), and, of course, the lien acquired by the docketing of their judgments could not be disturbed by the application of the administrator for leave to sell the real estate, for the payment of debts, and the obtaining of permission to do so. But yet, the plaintiff had a right to compel an accounting by the administrator (2 R. S. 92, § 52), and a sale of the real estate (*id.* 108, § 48) for the payment of his and other debts. Thus, the real estate was to a degree subject to the payment thereof, and was in fact, from the slender amount of the personal property, substantially all that he could look to for payment. His position was not as good in some respects as that of a judgment creditor, but it was not unlike it; both had a right to have the real estate sold for the payment of their debts; for a certain space of time it could not escape the exercise of that

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right; and it cannot be said that the interest of a judgment creditor in the real estate, as an interest in property, was greater or nearer than that of the plaintiff. It was more manageable, but not more direct in the end.

The general definitions of the phrase "insurable interest," as given in the text-books, are quite vague and not always concordant. See 1 Arnould on Mar. Ins. 229; Runyon on Life Ass. 16; Hughes on Ins. 30; 1 Marshall on Ins. 115; 1 Phillips on Ins. 2; *id.* 107; Sherman on Ins. 93; Parsons on Merc. Law, 507; Parsons on Cont. 438; Angell on Ins., § 56; Flanders on Fire Ins. 342; May on Ins., § 76. The last cited author says, that an insurable interest sometimes exists, where there is not any present property, any *jus in re*, or *jus ad rem*, and such a connection must be established between the subject-matter insured, and the party in whose behalf the insurance has been effected, as may be sufficient for deducing the existence of a loss to him, from the occurrence of an injury to it; and that the tendency of modern decisions is to admit to the protection of the contract, whatever act, event or property, bears such relation to the person seeking insurance, as that it can be said, with a reasonable degree of probability, to have a bearing upon his prospective pecuniary condition. While on the other hand, the statement is, that the interest must be founded on some legal or equitable title; and if it be inconsistent with the only title which the law can recognize, it will not be deemed an insurable interest. Marshall on Ins., *supra*. But the result of a comparison of the text writers above cited is, that there need not be a legal or equitable title to the property insured. If there be a right in or against the property, which some court will enforce upon the property, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest. Thus a mortgagee of real estate, though he hold also the bond of the mortgagor, has an insurable interest in the buildings; while a judgment creditor of the same mortgagor, his judgment being a lien upon the same real estate and the same buildings, is said not to have an insurable interest in them. The interest of the first is said to be specific, the interest of the latter general. As a general rule, the distinction may be sound. But I think it would be difficult to show an appreciable practical difference in the pecuniary result to the two. If the mortgagor and judgment debtor should die leaving no personal property, and no real estate save that mortgaged, if principally valuable for the buildings upon it, and they should be burned, each must then look to the real estate,

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the lands alone, for a security for his debt; and if that be insufficient each must, with equal certainty, suffer a pecuniary disaster, resulting directly from the fire. What legal reason is there, why the one may not, as well as the other, protect himself by a contract of insurance?

In *Grevenmeyer v. So. Mut. F. Ins. Co.*, 62 Penn. St. 340, it was held that a judgment creditor, whose judgment was taken for the purchase-money of the property burned, had no insurable interest. See, also, *Conard v. At. Ins. Co.*, 1 Pet. 386. The reason given is, that his lien was general, and not specific; that he was not interested in the property, but in his lien only. His judgment was distinguished from a mortgage, in that the latter is a specific pledge of definite property, and the mortgagee has necessarily an interest in it; while the judgment is a general, and not a specific lien; so that if there be personal property of the debtor it is to be satisfied out of that; if there be not, then it is a lien on all his real estate without discrimination. And, citing *Dover v. Black*, 1 Barr, 493, it is said that a judgment creditor has neither *jus in re*, nor *jus ad rem*, as regards the judgment debtor's property. It seems to me that the decision there goes very much upon the fact or the assumption that the judgment debtor had other property, real and personal, to look to than the real estate damaged; and that it does not touch the case of a judgment creditor whose only or principal reliance for payment was upon the property destroyed. That there need not be an existing *jus in re*, or *jus ad rem*, is declared by STORR, J., in *Hancock v. Fishing Ins. Co.*, 3 Sum. 132-140; and also, that the right to pursue the debtor personally does not deprive the creditor of an insurable interest. *Id.* In *Putnam v. Mercantile Mar. Ins. Co.*, 5 Metc. 386, which was an insurance for a commission merchant, upon his expected commission from the sale of a cargo consigned to him to be sold, but in which cargo he had no other ownership or interest, it is said, that such an interest in property connected with its safety and its situation, as will cause the insured to sustain a direct loss from its destruction, is an insurable interest. The question is one of damages rather than title or possession; and it will be enough in general to show such a relation between the insured and the property, that injury to it will in natural consequence be loss to him; and it is not necessary to show that the insured is the legal or equitable owner. *Wilson v. Jones*, L. R. 2 Exch. 139; *Buck v. Ches. Ins. Co.*, 1 Pet. 151, * 168. It will be perceived, that between the case cited from 62 Penn. St., *supra*, and the case in hand, there are some features of distinction; here the debtor was dead; there was no longer any personal liability, nor sufficient personal property to satisfy the debt; nor as may be inferred any

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other real estate than that insured. A fund for the payment of the debt was to be found only in this estate, and principally in the buildings insured. By force of these circumstances, and by operation of the statutes above referred to, this real estate was, for a certain length of time, bound for the payment of this debt. As it was bound, as it alone was bound, as there was nought else, nor any person, liable for the debt, it is difficult to see why, in effect, the debt was not as if a specific lien upon this real estate. A lien, in its most extensive signification, is a charge upon property, for the payment or discharge of a debt or duty. A specific lien is a charge upon a particular piece of property, by which it is held for the payment or discharge of a particular debt or duty, in priority to the general debts or duties of the owner. It is not the name of the right which gives or refuses an insurable interest; it is the character of the right. A specific lien gives an insurable interest, because loss of the particular property is at once seen to affect disastrously the specific lienor. But when a right to payment of a debt exists, which can be satisfied only from a particular piece of property, is there not the same result from the same cause? If I have a debt against another, and he have but one piece of real estate from which my debt may be made, and he die leaving no personal estate, though in technical language my lien may not be specific upon that real estate, it is true in fact, that there is a specific piece of property from which alone I may hope to satisfy my lien, and which is alone legally bound to satisfy it, and I am, practically, just like one to whom that piece of real property has been specifically pledged for a specific debt. If the latter, for that he may suffer pecuniary loss by the burning of that real property, has such an interest, as that he may insure against that burning, I have such an interest also, and I too may insure. The probability, nay the possibility, of the payment of the plaintiff's debt, out of the property of the deceased debtor, rested entirely upon the contingency of this real estate remaining without serious impairment in value.

The reports of this State are meagre upon this precise question. In *Mapes v. Coffin*, 5 Paige, 296, the complainant had levied upon chattels in the hands of an executor of the judgment debtor, which had been insured by the testator in his life-time, and which were destroyed by fire after the testator's death, and after the levy. The chancellor, in a contest between judgment creditors, gave the avails of the insurance to the creditors who had made the first levy. Perhaps the levy upon the property made a specific lien upon it, and so the case does not much aid us. In *Mickles v. Roch. City Bk.*, 11 id. 118, the defendants were judgment creditors of a manufacturing corporation, had issued several executions,

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had sold and bid in personal property, and advertised for sale the real estate. Pending the advertisement, they took out insurance on the buildings and fixtures in the joint name of themselves and the corporation. A few days after the real estate was sold and bid in by the defendants. After that occurred a fire, with damage to the buildings and fixtures. The insurers repaired the buildings, and paid for the damage by fire to the fixtures. The real estate was never redeemed. There seems to have been no doubt made of there being an insurable interest in the creditors. By advertising the premises for sale, they came nearer making their judgment a specific lien thereupon, though it was still a general lien upon all other like property. In *Springfield F. and M. Ins. Co. v. Allen*, 43 N. Y. 389-395, 396, it is said by ALLEN, J.: "An insurable interest may exist, without any estate or interest in the *corpus* of the thing insured;" "it was enough that" there be "a pecuniary interest in the preservation and protection of the property, and" that one "might sustain a loss by its destruction." I know of no decision in this State bearing more directly upon this precise question, than that in *Herkimer v. Rice*, 27 N. Y. 163. The propositions advanced there are sufficient, if sustainable, or if to be taken as authority, to uphold an insurable interest in the plaintiff in the case in hand. DENIO, Ch. J., there says: "It is certain that the creditors had no estate whatever in the real property. In a technical sense they had no lien. But they had important rights connected with it, and a pecuniary interest in its preservation. * * * The law does not require that the assured shall have an estate or property in the subject of the insurance. * * * No property in the thing insured is required. It is enough, if the assured is so situated as to be liable to loss, if it be destroyed by the peril insured against. Creditors having no other means of enforcing their debts, but having a direct and certain right to subject the real estate to a sale for their benefit, have an interest as positive and absolute as one having a specific lien, or even as the owner himself. * * * The creditors, whether by simple contract or specialty, under our laws, are parties interested in the real estate, when there is a deficiency in the personal, for they have power to subject it to the payment of their debts." It is urged that these remarks are *obiter dicta*, and that the real question to be decided and which was decided in the case was, whether an administrator of an insolvent estate had such an interest in the real estate of his intestate as was insurable. *Dicta* are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself (4 Burr. 2064-2068); *obiter*

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dicta are such opinions uttered by the way, not upon the point or question pending (*Rouse v. Moore*, 18 Johns. 407-419), as if turning aside for the time from the main topic of the case to collateral subjects. I think that no one who reads the opinion in *Herkimer v. Rice* can doubt that all which was said on the subject of a creditor of an insolvent estate having an insurable interest in the real property thereof, was the professed and deliberate determination of the learned Chief Justice, not hastily formed nor carelessly expressed; not by the way nor on a collateral question to that awaiting decision, but deemed essential to lead up to the solemn judgment rendered. The direct question was, indeed, whether an administrator of an insolvent estate might insure its real property. But the reasoning of the opinion shows that this was deemed to depend upon whether the creditors of that estate had such an interest. After stating the question, he says: "It will be convenient to consider, in the first place, *whether the creditors themselves have such an interest*; and then, whether the *administrator can be said to represent that interest*, so as to enable him to make the contract for the benefit of the creditors." Again, * * * "the creditors of an insolvent estate are generally numerous, and having no opportunity for concerted action, except through the executor or administrators, they could scarcely ever avail themselves of the advantage of insurance, unless by the agency of the representatives. If the administrators cannot insure, *the parties interested, the creditors*, will be excluded from a remedy which all other persons having a similar interest possess." He then proceeds to show that an agent or trustee may insure the interest of a party beneficially interested, and that the administrator, though not the trustee of the land, is the trustee of a power over it, such as is recognized by law, and says: "In this case it was sufficiently apparent, from the language of the receipt for the premium, that it was the interest of the creditors which was designed to be covered by the contract; the beneficiaries of the administrator were the parties intended to be protected; the insurers, therefore, must have seen and known that it was the interest of the creditors * * * which it was the object of the policy to protect, * * * and which was the subject of the contract." There is more to the same effect; and the opinion is based upon the ground that the administrator is the representative of the creditors. Indeed, but for their being creditors, the administrator would have no concern in the land, and the concern he has with it is, that they through him may dispose of it for the payment of their debts. *Herkimer v. Rice* was a case in which there was full argument and consideration. I consider it gives reasons, as well as authority, for the determination of the question now in consideration. It has often

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been cited as an authority, and at times as authority for the power of an executor or administrator to insure, as having, or as representing an insurable interest, holding it for the beneficiaries under the will, or in the intestate's estate. *Savage v. Howard Ins. Co.*, 52 N. Y. 502. In *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, it is cited by ANDREWS, J., as holding that when the personal estate of an intestate is insufficient to pay the debts, the administrator has an insurable interest in buildings, on the ground that he is the trustee of a power to sell the land for the benefit of creditors, and that *as the interest of the creditors is the subject of the insurance*, the administrator may insure for their benefit. The decision is there put aside as not a precedent for that then in hand, inasmuch as in that the personal property was sufficient to pay the debts, and therefore the administrator had no insurable interest. See also *Waring v. Loder*, 53 N. Y. 581, where it is cited as authority for the proposition, that a mortgagor after he has sold the mortgaged premises has still an interest in it which is insurable, inasmuch as it stands between him and personal liability for the mortgage debt. The distinction is not perceptible, so far as this question is concerned, between a power to obtain indemnity against loss from being obliged to pay a debt owing to another, and against loss from failure to obtain payment of a debt owing to one's self. I conclude that a creditor of the estate of one deceased, whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor, when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditor thereby.

The policy runs to the plaintiff, and by its terms insures him "on his two buildings." The defendant now insists, that it appeared upon the trial that the plaintiff was not the owner of the property insured at the time of the insurance, and that the complaint should, for that cause, have been dismissed on its motion. If I appreciate the point made, it is, that as the policy purports to insure "his two buildings," and as he did not then own the two buildings which were afterward burned, it cannot now be said that the policy was upon the two buildings destroyed. There is no doubt what property the plaintiff and defendant meant to insure, or that it was that which was subsequently burned, which was from the beginning of the transaction to the time of the fire in his possession. Simply as a description of property, in which light alone I am now treating the phrase, it was not a warranty of ownership, nor a material misrepresentation (*Niblo v. North American Fire Ins. Co.*, 1 Sandf. 551; *Traders' Ins. Co. v. Robert*, 9 Wend. 404; *Tyler v. Anna P. Ins. Co.*, 12 id. 507); and simply as a phrase of description it

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indicated the purpose of the parties and what property was in their minds. The policy is not avoided in this view of it. There is nothing in *Springfield F. and M. Ins. Co. v. Allen*, *supra*, in conflict with this.

There is another view of the matter, however, in which the phrase and the circumstances in which it was used may be of more advantage to the defendant. By the fourth condition of the policy it is provided, "that if the interest of the assured in the property be any other than the entire, unconditional and sole ownership, for the use and benefit of the assured, * * * it must be so represented to the company, and so expressed in the written part of the policy, otherwise the policy shall be void." By the first condition it is provided, "that any omission to make known every fact material to the risk, or any misrepresentation whatever, or if the interest of the assured in the property * * * be not truly stated in the policy * * * it shall be void." It is plain that these conditions have not been observed and kept by the plaintiff. The nature of his interest in the property was not expressed in the policy; and it was other than the ownership of it. The application was referred to in the policy; and by the first condition of the policy, in such case the application became a warranty. In it, it is stated, that the plaintiff has disclosed all the facts in relation to the property so far as the same are known to him. But in answer to the question: "Is your title to the property absolute? If not, state its nature and amount;" the only answer given is: "His deceased wife held the deed." There is in that answer no affirmation of a falsehood, for his deceased wife did in fact hold the deed; but there is not a just, full and true exposition by the answer of all the facts and circumstances. The purport of the question and of the answer to it would imply and convey the idea that he was in equity the owner, though the formal legal title was in the wife. The facts of his interest in or connection with the property were quite otherwise. The written application did not, by its representations, put the defendant in possession of the exact facts of the case; it did thereby tend to mislead as to the real situation of the property and the real interest of the plaintiff in it. The application, in this respect, was a warranty. *Chaffee v. Catt. Co. Mut. Ins. Co.*, 18 N. Y. 876. The truth of that warranty became a condition precedent to any liability to the plaintiff from the defendant (*Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240); and it was a warranty and a condition precedent, not to be avoided by any consideration of whether it was essential to the risk or not, or whether or not it was an inducement to the defendant to enter into the contract. *Id.* It is very evident that the plaintiff did not intend a deception upon the defendant; nay, it is evident that he laid open to Brand, the

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agent of the defendant to procure and submit applications, and to issue policies when signed by the proper officers of the defendant and transmitted to him, all the facts of his connection with and interest in the property; and that the statements in the application were Brand's conclusions from those facts, and the omissions from it were of matters not deemed essential by Brand. It is, hereupon, urged by the plaintiff that the errors and omissions were those of the defendant. But the plaintiff and defendant have, in the policy, the contract between them, expressly agreed that Brand should be deemed the agent of the plaintiff and not of the defendant, under any circumstances whatever. It is true, that in *Plumb v. Catt. Co. Mut. Ins. Co.*, 18 N. Y. 392, a rule is held which tends to the shielding of the plaintiff, in this case, from the effect of his contract; but since then, it is held, that under such a contract as this the knowledge of such an agent of facts not stated in the application, is immaterial in the absence of fraud, or prevention of the statement of them by the applicant. *Chase v. Ham. Ins. Co.*, 20 id. 52; where the case in 18 New York, *supra*, is considered and distinguished. As to *Rowley v. Empire Ins. Co.*, 36 N. Y. 550, cited in General Term opinion, it is much shaken in *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565-570. It is to be regretted that corporations, of the power and extended business relations with all classes in the community, which insurance companies have, should prepare for illiterate and confiding men contracts so practically deceptive and nugatory; and should, in cases as free from fraud and wrong on the part of the insured as this is, hold their customers to the letter of an agreement so entered into. I am aware that often the companies are made the victims of dishonest and designing persons, but I cannot agree that the remedy for that, is to refuse to be bound by the acts of agents of their own selection when dealing with simple and unlettered men. If there should be less greediness for business, and such care in the selection and appointment of agents as would insure the confidence of the companies in their capability, discretion and integrity, it would not need that there be laid upon unwise policy-holders an agreement to take the burden of the opposite qualities in those put forward to them as actors for the insurers. But we must take the contracts of the parties as we find them, and enforce them as they read. By the one before us the plaintiff has so fettered himself as to be unable to retain, as the case now stands, the real essence of his agreement. Though he has frankly and fully laid before the actor between him and the defendant all the facts and circumstances of the case, he is made responsible for error in legal conclusions which he never formed, and which were arrived at by one in whom he trusted and whom

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he supposed to stand in the place of the defendant. The plaintiff claims that the answer of the defendant contains no allegation which will permit it to avail itself of the defense just noticed. Without determining what is the condition of the pleading in that respect, it is enough to say that the facts, upon which the point is now made, were before the court, without objection from the plaintiff based upon the lack of averment in the answer; nor does it appear that any ruling of the court was put upon a deficiency in the allegations of the answer. See *McKechnie v. Ward*, in MS.*

Held to the letter and substance of his contract the plaintiff made a breach of a warranty and condition precedent, upon the truth of which his contract rested, and for that reason may not recover in this action as the facts now stand.

The complaint in this case contains certain allegations, and a prayer for judgment thereupon of a reformation of the contract. Whether, upon a new trial, these allegations and the proof which can be made under them will be sufficient for such a judgment we do not now declare.

The point made upon the averments in the proofs of loss, we need not closely consider at this time. The condition of the policy which is claimed to be violated is, that if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth in the proof of loss with their respective interests therein; and that all fraud, or attempt at fraud, by false swearing, shall cause a forfeiture of all claims on the company under the policy. The facts are not distinctly brought out on the trial as to the state of the title at the time of the fire. Though it appears that at the death of the plaintiff's wife she held all the title to the premises, it does not positively appear but that the title may have become the plaintiff's after her death and before the fire. The deed to the deceased wife having been shown, there is the presumption of the continuance of the title thereby created. No change had been shown, as I read the testimony, though the defendant's points state that it is claimed that the plaintiff bid in the premises at an auction sale just before the fire. His statement in his proofs of loss is, that the property insured belonged to him. It is not plain that this would be a fraudulent and false statement, if there had been a judicial sale at auction before the fire and he had bid in the premises. As there is to be a new trial, it is better to leave this question to be determined on a fuller state of the facts.

The judgment appealed from must be reversed and a new trial ordered, with costs to abide the event.

Al. concur.

Judgment reversed.

WOODFORD V. PEOPLE.

(62 N. Y. 117.)

Indictment — duplicity — arson — charging the burning of several buildings.

An indictment for arson charged as a single act the burning of several houses. *Held*, to charge but one offense, and therefore not bad for duplicity.

INDICTMENT for arson, containing two counts.

The first count charged that the accused, on the 27th day of October, 1873, "at the town of Lenox, in the county of Madison, aforesaid, with force and arms in the night-time of the said day, certain dwelling-houses, the property of the several persons hereinafter named and set forth, to wit: One belonging to Eliza A. Perry, two belonging to Elizabeth Young, one belonging to Mary H. Parker, one belonging to John H. Johnson, one belonging to Matthew Worth, one belonging to Alvin Wells, one belonging to a Mrs. Fay, one belonging to Friend A. Andrews, one belonging to Mrs. John Montross, one belonging to Mrs. Delano, one belonging to David H. Rasbach, and others belonging to divers persons to the jurors unknown, in all about thirty-five dwelling-houses then and there situate (there being then and there within the said dwelling-houses some human being), feloniously, willfully and maliciously did set fire to," etc.

The second count charged that the accused, "on the day and in the year aforesaid, at the town of Lenox, in the county of Madison aforesaid, with force and arms in the night-time of the said day, certain dwelling-houses of divers persons and individuals and people to the jury unknown, and particularly a certain dwelling-house of Eliza A. Perry, one dwelling-house belonging to Mary H. Parker, one dwelling-house of David H. Rasbach and one dwelling-house of Carrie Bond, one dwelling-house known as the Beecher block, in Canastota, N. Y., then and there situate (there being then and there within the said dwelling-houses some human being), feloniously, willfully and maliciously did burn," etc.

At the commencement of the trial the prisoner's counsel moved to quash the indictment for duplicity; the motion was denied and said counsel excepted. He then requested the court to direct the district attorney to confine himself to one dwelling-house. The court stated that he must be confined to the fire stated in the indictment, but declined to give directions as to one dwelling-house. To this said counsel excepted. The counsel then requested the court to require the district attorney to elect under which count he would proceed, as two offenses were charged.

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The court declined and counsel excepted. He then objected to any evidence under the indictment, on the ground among others of duplicity. The objections were overruled and exceptions taken. The evidence tended to show that the fire was set about midnight, when a furious wind was blowing, in a small barn or shed adjoining a dwelling, and spread from one dwelling to another until thirty-five in all were consumed, among them the house of Mary H. Parker.

The jury returned a verdict of arson in the first degree, and the judgment entered thereon was affirmed by the Supreme Court.

Lyman & James, for plaintiff in error.

G. A. Forbes, for defendant in error.

CHURCH, C. J. [After deciding that upon an allegation of ownership of a dwelling-house in an indictment for arson the legal presumption is that the person named as owner is in possession.]

It is also urged with considerable force, that the indictment is bad for duplicity in charging two or more offenses in each count. It has been held in this State that when two offenses requiring different punishments are joined in the same count the objection may be taken advantage of by motion in arrest of judgment. 9 Wend. 193. If these counts are to be regarded as charging a distinct offense for burning each house I do not see how the withdrawal of all claim to convict the prisoner for burning any house but that of Mary H. Parker would aid the prosecution in answering the objection to the indictment. If that is fatally defective it could not be cured by amendment on the trial. I have examined the question with considerable care and have arrived at the conclusion that each count charges only a single offense. It charges the burning of a number of houses by a single act, at one time and place. This is I think the proper legal construction of the pleading. For aught that appears in the indictment these houses were all in a block or row, and all connected together, and if not that they were so situated that the firing of one would naturally if not necessarily burn and destroy the others, or at all events that the fire was communicated to all from a single setting. They are charged to have been burned by a single act of firing and burning. A conviction upon separate indictments could not be had for each separate house, although an indictment may have been good for any one, and a conviction or acquittal upon such an indictment would be a bar to an indictment for burning any other house burned by the same act. These consequences must follow from the position that there was but one crime committed in respect to all the dwelling-houses,

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and that the respective counts charge but one crime. It is a general rule that no matters however multifarious will operate to make a declaration, information or indictment double, provided that all taken together constitute but one connected charge or one transaction. 20 Conn. 232; *Rowles v. Lusty*, 4 Bing. 428.

The same principle applies where the evidence fails to prove the extent or magnitude of the charge as alleged in the indictment, provided a specific crime alleged is established. Whart., §§ 391, 624. The stealing of various articles at the same time and place is but one offense, and this is so even though the articles belong to different persons. An indictment for stealing three negroes was sustained upon proof that one was stolen. *Id.*, and cases cited. It is urged that this rule is not applicable because the houses did not in fact burn at the same time, and did not of course occupy the same spot. The answer is that it was one transaction. The criminal act was in kindling the fire with the felonious intent to burn the dwelling-houses specified, and was fully consummated when the burning was effected. The fire was not set in any one of the houses specified, but the charge is that the fire was kindled in the shed for the purpose of burning the houses, and there can be no question that an indictment for burning one house will be sustained by proof of the firing of another with the criminal intent of burning the house specified. Otherwise, a criminal liability for a higher offense could be avoided in most cases. The several houses could not burn at the same instant, nor could they occupy precisely the same place, but the criminal act was single, and the consequences ensued according to the nature of the act.

The case of *Regina v. Trueman*, 8 Car. & P. 727, recognizes this principle. That was an indictment of five counts for arson, charging the burning of five houses belonging to different persons. It was stated in the opening that the houses were in a row of adjoining houses, and upon application to compel the prosecutor to elect, *ERSKINE, J.*, said: "As it is all one transaction we must hear the evidence. * * * I shall take care that as the case proceeds the prisoner is not tried for more than one felony." The fact that the houses were not burned at the same instant, and that but one was set fire to, were not regarded sufficient to constitute the burning of each a separate offense. The circumstances that there were five counts does not impair the authority. According to the view of the court, all could more properly have been included in a single count. An indictment, charging burglary with intent to commit larceny, and also charging larceny, is not bad for duplicity. 20 Pick. 356; 2 Colby's Cr. Law, § 6. So, after breach and entry with intent to set fire to the building (10 Metc. 422), and uniting with a

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charge of burglary with an intent to steal the property of one person, a charge of stealing the property of another, was held not double. 14 Ver. 353. So, the various offenses under the statute of counterfeiting, as forgery, causing to be forged, and assisting or aiding, may be charged in one count. Whart. Crim. Law, § 390. An indictment charging the prisoner with having *destroyed, defaced and injured* a parish register, was held good, as it related to one transaction. 1 Car. & K. (N. P.). 501.

An indictment for robbery, charging the prisoners with assaulting G. P. and H. P., and stealing from one 2s. and from the other 1s., is good, if the robbing was all one act. *R. v. Gibbon et al.*, 1 Car. & M. 634.

If a person shoots three persons by a single shot, with the necessary criminal intent, a single count for the murder of the three would, I apprehend, be good, although they may not all have died at the same time, and proof that one only was killed would sustain the indictment.

In *Rex v. Benfield*, 2 Burr. 980, the court refused to arrest the judgment upon an indictment for a libel upon two persons. It was in that case that Lord MANSFIELD, in overruling the case of the *King v. Clendon*, 2 Ld. Raym. 1572, which arrested judgment for duplicity in the indictment in charging an assault upon two persons, used the expression, "cannot the king call a man to account for a breach of the peace, because he broke two heads instead of one?" This remark is said to have originated the idea that several distinct misdemeanors might be united in one indictment, although the expression only justified an indictment for all the consequences of a single act, and to that extent it is a significant authority.

It follows, that two or more persons may be assaulted or killed by a single act, or two or more buildings burned by a single act, and in such cases it seems clear that the offense may be regarded as single. This accords with reason, and the rule can work no injustice to the party accused. He is only tried for a single offense, a single act. If that act is theft, and embraces a variety of articles belonging to different persons, or if assault or other crime upon several, or arson for burning by a single fire numerous buildings, there is but one offense, and he cannot justly complain because the defense may be somewhat burdened by the extent of the consequences which his act has produced. I am, therefore, of opinion that the indictment is not bad for duplicity.

[The other objections considered were not important.]

Judgment affirmed.

MAXMILIAN V. MAYOR.

(62 N. Y. 160.)

Municipal corporations — liability of, for acts of officer.

Where a municipal corporation elects or appoints an officer in obedience to a statute, to perform a public service, in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as a servant or agent of the municipality, for whose negligence or want of skill it can be held liable.

A statute created a Department of Charities in the city of New York to have charge of the alms-houses and the care of paupers, destitute children, lunatics, etc., the officers of which were to be appointed by the mayor. *Held*, that the duties of the department were public in their character and not municipal, and that the officers and their employees were not servants of the city in such sense as to make it liable for their negligence while using its property in the discharge of their duties. (*See note, p. 474.*)

ACTION by Rosalie Maxmilian, administratrix of the estate of Max K. Maxmilian, deceased, to recover damages for the death of plaintiff's intestate caused through the alleged negligence of defendant's servant.

On the 26th of May, 1871, while plaintiff's intestate was endeavoring to get into a street car, he was knocked down and run over by an ambulance wagon, driven by an employee of the Commissioners of Public Charities and Corrections of the city of New York, and from the effect of the injuries thus received he died shortly after. The accident was caused by the negligence of the driver of the ambulance, who was engaged at the time in the performance of his duties. The ambulance belonged to the city of New York.

On the trial a nonsuit was granted on the ground that the driver was a servant of the Commissioners of Charities and Corrections, and that the city was not responsible for their acts or the acts of their servants.

The other facts are stated in the opinion.

The nonsuit was affirmed by the Supreme Court and the plaintiff appealed.

Lucien Birdseye, for appellant.

D. J. Dean, for respondent.

FOLGER, J. It is sought to charge the defendant in this case, upon the rule that the employer must answer for the negligent act of the servant: the rule of *respondet superior*. And it is clear that upon no other principle can the defendant be charged. Conceding that the ambulance

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wagon and the horse before it were the property of the defendant, there is no intimation that the establishment was not, in all respects, such as was fitting for the use for which it was kept, and to which it was in fact put at the time. It was personal property, well adapted to the service in which it was engaged, in itself innocuous. The harm to the plaintiff's intestate resulting alone from the immediate negligent use of it by the driver of the wagon, the servant in whose charge it was; on the ground alone of a responsibility for that negligence, as the negligence of its servant, can the defendant be charged. This rule of *respondet superior* is based upon the right which the employer has to select his servants, to discharge them if not competent, or skillful or well behaved, and to direct and control them while in his employ. *Kelly v. The Mayor*, 11 N. Y. 432. The rule has no application to a case in which this power does not exist. *Blake v. Ferris*, 5 N. Y. 48. It results from the rule being thus based, that there can be but one superior at the same time and in relation to the same transaction (*Langher v. Pointer*, 5 Barn. & Cres. 560); as the law does not recognize two principals who are unconnected and severally responsible. *Hobbit v. L. and N. W. Railway*, 4 Exch. 253; *Pack v. The Mayor*, 8 N. Y. 222. And yet there may be sub-agents, servants under a servant; and whether they be appointed by the master or principal directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. *Quarman v. Burnett*, 4 Mees. & Welsb. 499. That a municipal corporation, as is the defendant, may be placed by the facts of a certain case under the effect of this rule, and made answerable for the negligent use of its well adapted personal property by its servant or sub-servant, need not be denied. *Lee v. Sandy Hill*, 40 N. Y. 442; *Clark v. Washington*, 12 Wheat. 40; *Scott v. The Mayor, etc.*, 37 Law and Eq. 495. The difficulty is not here; it is in determining, in a particular case, whether the negligent employee is the servant of the municipality, for it is not every one who has in charge personal property owned by the municipality, and sets about some lawful act with it within the municipal bounds, that is its servant; nor even if his appointment comes intermediately or immediately from the municipality itself. If the act of the officer or the subordinate of the officer thus appointed, is done in the attempted performance of a duty laid by the law upon him and not upon the municipality, then the municipality is not liable for his negligence therein. Such is the general principle laid down in *Martin v. The Mayor*, 1 Hill, 545 and reasserted in *Lorillard v. The Town of Monroe*, 11 N. Y. 392, and in other cases. See, also, *Russell v. The Mayor*, 2 Den. 461; *Bk. Comm. v. Mayor etc.*, 43 N. Y. 184-189. There are

two kinds of duties which are imposed upon a municipal corporation. One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public and is used for public purposes. *Lloyd v. The Mayor*, 5 N. Y. 374. The former is not held by the municipality as one of the political divisions of the State; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the State, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser by the public agents. *Eastman v. Meredith*, 36 N. H. 284. Where the duties which are imposed upon municipalities are of the latter class, they are generally to be performed by officers who, though deriving their appointment from the corporation itself, through the nomination of some of its executive agents, by a power devolved thereon as a convenient mode of exercising a function of government, are yet the officers, and hence the servants, of the public at large. They have powers and perform duties for the benefit of all the citizens, and are not under the control of the municipality which has no benefit in its corporate capacity from the performance thereof. They are not then the agents or servants of the municipal corporation, but are public officers, agents or servants of the public at large, and the corporation is not responsible for their acts or omissions, nor for the acts or omissions of the subordinates by them appointed. *Fisher v. Boston*, 104 Mass. 87; S. C., 6 Am. Rep. 196. And where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service, in which the corporation has no private interest and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as a servant or agent of the municipality, for whose negligence or want of skill it can be held liable. It has appointed or elected him, in pursuance of a duty laid upon it by law, for the general welfare of the inhabitants or of the community. *Hafford v. New Bedford*, 16 Gray, 297. He is the person selected by it as the authority empowered by law to make selections; but when selected and its power exhausted he is not its agent, he is the agent of the public for whom and for whose

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purposes he was selected. So that it may be, that a driver of an ambulance wagon owned by the defendant is neither its servant nor under servant, for whose negligence it is responsible. How this is, is to be arrived at by a consideration of the provisions of law, under which the driver took charge of and conducted the horse and wagon. It is easily gathered from the case that he was not chosen immediately by the defendant, nor by any of its agents falling within the class of its executive officers, nor was he immediately controllable or removable by it or by them. He was immediately selected by, was under the immediate control of, and power of removal of, the commissioners of public charities and correction. His payment came immediately from them, though the moneys therefor came out of the municipal treasury. Hence, he was no nearer, at the best for the plaintiff, than a sub-agent of the defendant; and not that, unless the commissioners of charities and correction were agents of the defendant rather than public officers of the greater public. These commissioners have their direct creation, their direct grant of power and their direct imposition of duty from the act of 1860 (Laws of 1860, ch. 510, p. 1026), though they succeed to the powers and duties of similar officers theretofore existing. By this act that department is created in the city and county of New York, and it is declared that there shall be chief officers thereof, and their name of office is designated. § 1. They thereby have their appointment from the comptroller of the city and county, though since then they are made a department of the city and appointable by the mayor. Laws of 1870, ch. 137, p. 366, §§ 29, 30; page 386, § 80. It is not needed that I minutely enumerate all the powers which were conferred upon this department and its chief officers. They were powers of control, management, maintenance and direction, over all the real and personal property which theretofore was of the almshouse department, with certain exceptions immaterial here, and of appointment and removal of subordinate officers, and to require of the supervisors of the county the levy by tax of such moneys as should be needed by them, and of control of the poor and of certain other persons. The duties of this department and its head officers were to care for paupers, for poor and destitute children, for lunatics and strangers, and for certain persons committed for offenses. This becomes the practical question: Are the acts, which are to be done by the commissioners of charities and correction, acts to be done by them in their capacity as public officers in the discharge of duties imposed upon them by the legislature for the public benefit; or are they acts done for the defendant, in what may be called its private character, in the management of property or rights voluntarily held by it for its own immediate profit or advantage

as a corporation, though inuring ultimately to the benefit of the public? *Oliver v. Worcester*, 102 Mass. 489; S. C., 3 Am. Rep. 485. There can be but one answer. The defendant is in no different position, in kind, from that in which is placed a township the most retired, the most sparse in population, in the State. The latter is under a law which requires its electors to elect officers, whose powers and duties are of the kind which the commissioners of charities and correction have. Those officers may for the time, as do the commissioners permanently, employ servants. The town has not the selection of those servants, nor the control nor power of removal of them. Nor is it interested, as a municipal division of the State, for its private emolument or advantage, in their acts. The overseers of the poor of a town, and the commissioners of charities and correction, are public officers, though getting their right of office from a circumscribed locality; and the acts which they may do are to be done in their capacity as public officers, in the discharge of duties laid upon them by the law for the public benefit, and far removed from acts done by city or town, in its municipal character, in the management of its property for its own profit or advantage. It is seen at once that the powers and duties of the commissioners of charities and corrections are not to be exercised and performed for the especial benefit of the defendant. It gets no emolument therefrom, nor any good as a corporation. It is the public, or individuals as members of the community, who are interested in the due exercise of these powers and the proper performance of their duties. They are such powers as are to be held by some officers throughout the State, in every part thereof, such duties as are to be performed in every local political division of the State, not for the peculiar benefit of such division but for the public, in the discharge of its duty to suffering or wayward members of the whole body politic. The territorial boundaries of the defendant are taken by the legislature acting as the organ of the sovereign power, and within them is created a department, and constituted a board of chief officers which, within those boundaries, is to have the power to use the public moneys of that political division of the State, for the due discharge of the duty of the State in that locality to the poor, the crazed, the wicked. It is a public duty laid upon the defendant, as a convenient mode of exercising a function of government, that it should, through its chief executive officer, from time to time appoint the chief officers of this department, and from time to time supply it with the means of performing its special public duties. These chief officers, though in a sense its officers, as having no power unless after appointment by it, and as mainly confined within its territorial boundaries, are yet officers of the State government, in the sense that

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they perform its function within a designated political division of the State. The defendant may not control them, save in strict accordance with the provisions of law. It does not select, nor control, nor remove, nor immediately pay their subordinates, their agents, their servants, and may not do so. How then does the principle of *respondeat superior* apply to its relations, to them and to the plaintiff, upon the case which she brings here? Nor does a review of all the various legislative provisions by which, in this division of the State, like duties have been performed by the exercise of like powers, though by officers, predecessors of these, deriving authority in slightly differing ways and to slightly differing extent, lead to a different conclusion as to the relation of the defendant to them. Through all the changes of enactment, it has been a duty laid upon this political division of the State, to provide the officers and the moneys for the care of certain classes of citizens; a duty, from the discharge of which no especial corporate benefit was to be had, and which was but the exercise of general power through local instrumentalities. The driver, the negligent actor, was the servant of the commissioners of the department of charities and correction. He was appointed by them, and put in charge of property of the defendant which was under their especial control. He was under their control only, liable to direction and removal by them only. He received his compensation directly from them, at a rate fixed by them. He could have but one superior liable for his negligent acts. The defendant was not that superior; for he was not its servant by immediate appointment, nor was he its sub-servant; for the commissioners though appointed by the defendant, in obedience to the statute, were selected to perform a public service not peculiarly local or corporate, because that mode of selection was deemed expedient by the legislature in the distribution of the powers of government, and are independent of the defendant in the tenure of their office and the manner of discharging their duties, are not to be regarded as servants or agents of the defendant, for whose acts or negligences it is liable, but as public or State officers with the powers and duties conferred upon them by statute.

There are cases, some of which are cited by the plaintiff, which are supposed by counsel to conflict with these views, but they are to be distinguished, and rest upon principles at harmony with those relied upon here. Where the duty is upon the city itself and not upon public officers appointed by it, where it accepts the duty and the power to reform it, and itself, by its own agents, sets about the work, or undertakes to set about it by its own agents, then, for negligent omission to do or for doing in a negligent way, it may be liable. Such was *Jones v. New Haven*, 34

Conn. 1. The power there given, from which the duty arose which was neglected, was said to be a power or privilege conferred upon the city at its request, and that the duty was not a public one. And so where it authorizes a use of its corporate property, which use itself makes that property harmful to others, it is liable. Such is understood to be one of the grounds on which went *The Mayor v. Bailey*, 2 Den. 433. And the duty of keeping in repair streets, bridges and other common ways of passage, and sewers, and a liability for a neglect to perform that duty, rests upon an express or implied acceptance of the power and an agreement so to do. It is a duty with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act. *Conrad v. Trustees of Ithaca*, 16 N. Y. 158. It is not always easy to say within which class a particular case should be placed. But when it is determined that the power and duty are given and taken for the benefit of the corporation as a corporate body, and the act to be done is to be done by it through agents of its appointment and under its control and power of removal, there is no doubt of its liability for negligent omission or negligent attempt at performance. When the powers created and duly enjoyed are given and laid upon officers to be named by the corporation, but for the public benefit and as a convenient method of exercising a function of general government, and the corporation has no immediate control nor immediate power of removal of those officers, nor of their subordinates and servants, then it is not liable for their negligent omission or action. This court is of the opinion that in the light of past decisions upon these points this case falls within the latter class.

The judgment must be affirmed, with costs.

All concur.

NOTE.—See *Mead v. New Haven*, 40 Conn. 72; S. C., 17 Am. Rep. 14, holding that the city was not liable for the negligence of an inspector of steam boilers appointed by it, as he was an agent of the State and not of the city. In *Elliott v. Philadelphia*, 75 Penn. St. 342; S. C., 15 Am. Rep. 599, the city was held not liable for a horse killed through the negligence of the police who had arrested its driver. See, also, *Ogg v. Lansing*, 38 Iowa, 495; S. C., 14 Am. Rep. 499; *Heller v. Sedalia*, 53 Mo. 159; S. C., 14 Am. Rep. 444; *Fisher v. Boston*, 104 Mass. 87; S. C., 6 Am. Rep. 196; *Grant v. Erie*, 69 Penn. St. 420; S. C., 8 Am. Rep. 272; *Wheeler v. Cincinnati*, 19 Ohio St. 19; S. C., 2 Am. Rep. 268; *Jewett v. New Haven*, 38 Conn. 368; S. C., 9 Am. Rep. 382; *Forbush v. Norwich*, 38 Conn. 225; S. C., 9 Am. Rep. 395.—REP.

Judgment affirmed.

KIRKLAND v. DINSMORE, appellant.

(62 N. Y. 171.)

Common carrier — limitation of liability — shipper bound by conditions in receipt, though unread by him.

Plaintiff delivered goods to defendant's express company for transportation, and received a receipt containing a condition that the company was not to be held liable for any loss occasioned by the dangers of transportation. The goods were lost *en route* without fault or negligence. Plaintiff did not read the receipt and the condition was not brought to his knowledge. *Held*, that plaintiff was bound by the condition, and that defendants were not liable.

ACTION against defendant as president of the Adams Express Company, a joint-stock company, to recover for the loss of a package of money alleged to have been intrusted to said company, as a common carrier, to carry from Wilmington, N. C., to Hudson, N. Y.

At the time of the receipt of the package, the company delivered to plaintiff a receipt therefor, which was retained by him, and which, after describing the package and its address, stated it was received "upon the special acceptance and agreement" (among other things) that the company was not to be held liable for any loss "occasioned by the dangers of railroad transportation or ocean or river navigation, or by fire or steam;" also that the company would not be liable for any loss unless the claim therefor was made in writing, at the office in Wilmington, within thirty days from the date of the receipt. The package was placed by the company's agent in a safe with other money packages, on board the steamer "General Lyon," to be conveyed from Wilmington to New York. The steamer, while on the voyage, accidentally caught fire, and with her cargo, including the package, was destroyed. It was admitted that this was without negligence on the part of the company.

The court found among other things the following :

"That the plaintiff did not read the receipt when it was delivered to him, nor was his attention called to its conditions or exceptions at that time by the agent of the company, or in any other manner, or by any other person; that he did not become acquainted with its contents until the following fall or winter; that he thought it to be an ordinary receipt for money, and not a contract; that when the receipt was handed to him he looked at it to see if the amount was correct; that when he took the receipt plaintiff supposed that it was to show that the company received the money, and that the money was to be sent, and that he could present the receipt and get the money again; that he looked at the receipt to see

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where the money was to be carried and to whom it was to be delivered; that he saw that it was signed by the company's agent, and looked at the date also, but that no knowledge of the limitations, exceptions and conditions printed at the bottom of the receipt was at the time brought home to the plaintiff, nor did he ever in any way assent to such limitations, exceptions and conditions.

"That when the plaintiff looked at the signature, 'Robinson,' at the bottom of the paper, he saw the printed matter contained in the paper. The language of the witness (plaintiff) was, 'I must have seen it.'

"That plaintiff had sent other packages by this company before, and had taken its receipts for the same, in general appearances similar to this, but had never read them.

"That the claim for said loss was not made in writing or otherwise, at the office of the company or otherwise, within thirty days from the date of the aforesaid instrument or receipt."

And as a conclusion of law, "that the special clauses of the receipt exempting the company from liability, except as therein stated, were not brought home to the knowledge of the plaintiff, or assented to by him, and cannot be deemed to be agreed upon by the parties," and that the receipt did not under the circumstances constitute an express contract between the parties.

Upon a trial by the court judgment was entered for the plaintiff, which was affirmed by the Supreme Court (4 T. & C. 304; 2 Hun, 46).

Chas. M. Da Costa, for appellant.

Horace R. Peck, for respondent.

ANDREWS, J. It is the settled doctrine in this State that the common-law liability of common carrier is not limited by a general notice that he will not accept or carry goods except under a restricted responsibility, although the notice is known to the shipper of goods when he delivers them for shipment. The law imposes on him the duty to carry goods if required, and affixes a responsibility for the safety of the goods which he cannot refuse to accept. It is the right of the shipper to have the goods carried under this general rule of responsibility, and it is held that an intention to waive this right cannot be inferred simply from a delivery, with knowledge of the carrier's notice, there being no other evidence of assent to have them taken under a modified or restricted liability. It is presumed under such circumstances that the shipper delivers the goods under the contract which the law creates, and not

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upon the terms stated in the notice. *Hollister v. Nowlen*, 19 Wend. 234; *Dorr v. New Jersey St. Nav. Co.*, 11 N. Y. 485. But the law does not forbid contracts between carriers and shippers fixing the terms upon which goods should be carried, and when there is a special contract it takes the place of the contract which the law in the absence of a special agreement implies, and so far as it speaks is to be resorted to to ascertain the rights and liabilities of the parties.

It has been repeatedly adjudged in this State that the acceptance by the shipper, on the delivery of goods for transportation to a carrier, of a receipt or bill of lading signed by the carrier expressing the terms and conditions upon which they are received, and are to be carried, constitutes, in the absence of fraud or imposition, a contract controlling the rights of the parties. *Collender v. Dinsmore*, 55 N. Y. 200; S. C., 14 Am. Rep. 224; *Magnin v. Dinsmore*, 56 N. Y. 168; *Hinckley v. N. Y. C. and H. R. R. Co.*, id. 429. The plaintiff, when he delivered the money package to the defendant's agent at Wilmington, took from him a receipt stating the amount of money contained therein, the name and residence of the person to whom it was to be sent, and that it was received upon certain special terms and conditions which were printed in the body of the receipt, among which is a provision that the company was not to be liable for loss or damage to the property, occasioned by "the dangers of ocean navigation, or by fire." The receipt was prepared by using a printed form of the company, and when completed by filling in the written portions, was signed by the defendant's agent and delivered to the plaintiff, who accepted it without objection, and forwarded it to the consignee of the package, who retained it until after the loss. The defendant, in due course of business, placed the package with other property in an iron safe, and put it in charge of a messenger upon the steamer "General Lyon," to be taken to New York, and while on the voyage to that port the steamer and its cargo, including the package in question, was destroyed by an accidental fire, which happened without any negligence on the part of the defendant or of the person in charge of the vessel.

It is plain that upon proof of the receipt and of the loss by fire under these circumstances, the defendant was, within the cases cited, *prima facie* exempt from responsibility.

The learned judge at the trial, in addition to the facts referred to, found that the plaintiff did not read the receipt when it was delivered to him, and that his attention was not called to its conditions or exceptions by the defendant's agent, or in any other manner, and that he did not

become acquainted with its contents until the following fall or winter; "that he thought it to be an ordinary receipt for money, and not a contract; that when the receipt was handed to him he looked at it to see if the amount was correct; that when he took it he supposed that it was to show that the company received the money, and that the money was to be sent, and that he could present the receipt and get the money again; that he looked at the receipt to see where the money was to be carried, and to whom it was to be delivered; that he saw it was signed by the company's agent, and looked at the date also." The judge further found, that when the plaintiff looked at the signature of the agent he saw the printed matter above it, but that he did not assent to the limitations and conditions therein expressed. He also found that the plaintiff had sent other packages by the defendant before, and taken receipts similar in appearance to this, but had never read them. The judge held as a conclusion of law, that the plaintiff was entitled to recover, on the ground that the special clauses in the receipt were not brought to his knowledge at the time, and could not be deemed to have been agreed upon by the parties, and did not enter into or form a part of the contract between them.

It is to be observed that although the judge found in general terms that the plaintiff, when he took the paper, thought that it was a receipt for money and not a contract, he must have intended simply that the plaintiff did not suppose it to be a contract limiting or qualifying the defendant's common-law liability. The other findings are inconsistent with the idea that the plaintiff was ignorant of the fact that the paper was a contract between the parties. He must have known that it bound the company to carry the money and deliver it pursuant to some agreement expressed in the receipt, for the judge finds that he supposed that "it was to show that the company received the money, and that the money was to be sent," and also "that he looked at the receipt to see where the money was to be carried, and to whom it was to be delivered."

The giving of a receipt or bill of lading by a carrier to a shipper, upon the delivery of goods for transportation, containing the terms and conditions upon which they are to be carried, is in the usual and customary course of business. ALLEN, J., in *Long v. N. Y. C. R. R. Co.*, 50 N. Y. 77.

It is not claimed that there was any fraud or imposition practiced by the defendant's agent. He did not represent that the paper was a bare acknowledgment of the receipt of the package, nor did he do any thing calculated to mislead the plaintiff, or put him off his guard. The plaintiff saw the signature of the agent and the printed matter preceding it, and

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the facts found leave no room to doubt that when he took the receipt he understood that it contained a contract on the part of the defendant, in respect to the carriage of the money. Can it be said that he is not bound by and did not assent to the limitations in the contract because he took the paper without reading it, and did not know its contents. The conditions are not unreasonable or unusual. They relieved the defendant from the stringent liability of an insurer, and on the other hand, no price for the service having been agreed upon, the plaintiff was only bound to pay for the carriage a compensation measured by the value of the service in view of the diminished risk assumed by the company. It is true that a contract implies an assent to its terms by the contracting parties, but a party may assent expressly or by implication. *BYLES, J., Van Toll v. South Eastern Railway Co.*, 104 Eng. Com. Law, 75. He cannot escape from the terms of a contract, in the absence of fraud or imposition, because he negligently omitted to read it, and when the other party has a right to infer his assent, he will be precluded from denying it to the other's injury. The plaintiff is we think in that position. The contract was one which the parties might lawfully make. The defendant had a right to infer from the plaintiff's acceptance of the receipt without dissent, that he assented to its terms, and now after a loss has occurred it is too late to object that he is not bound. If he had objected at the time, the defendant would have been entitled to exact, as a condition of carrying the parcel, a compensation equivalent to the risk of insurers. The circumstances imposed upon the plaintiff the duty to read the receipt. The case of *Blossom v. Dodd*, 43 N. Y. 264; S. C., 8 Am. Rep. 701, is not in conflict with the views here expressed. The circumstances in that case repelled the idea of a contract. The plaintiff received the card or ticket under circumstances indicating to him that it was given merely for his convenience and protection to enable him to identify the baggage on delivery and that he might know in whose possession it was. The chief judge distinguishes the case then before the court from cases like this. He says: "As to bills of lading and other commercial instruments, it has been held that persons receiving them are presumed to know from their uniform character, and the nature of the business, that they contain the terms upon which the property is to be carried."

We are of opinion that the plaintiff under the circumstances of this case is conclusively presumed to have assented to the terms contained in the receipt taken when the money was deposited, and that the judgment below should be reversed. See *Warhus v. The Bowery Savings Bank*, 21 N. Y. 543; *Pindar v. The Resolute Fire Ins. Co.*, 47 id. 114; *Breese*

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v. *U. S. Telegraph Co.*, 48 id. 132; 8 Am. Rep. 526; *Belger v. Dinsmore*, 51 N. Y. 166; 10 Am. Rep. 575; *Grace v. The Adams Express Co.*, 100 Mass. 505; 1 Am. Rep. 131; *Rice v. Dwight Mfg. Co.*, 2 Cush. 87.

All concur; MILLER, J., not sitting.

Judgment reversed.

 SHEA v. THE SIXTH AVENUE RAILROAD COMPANY, appellant.

(62 N. Y. 180.)

Master and servant — liability of master for acts of servant.

Defendant's street car was stopped so as to obstruct the street; plaintiff, a foot-passenger, wishing to cross the street, stepped upon the platform of the car in order to do so and was thrown off by the driver and hurt. On demurrer to a complaint alleging these facts, and that the driver acted "forcibly, willfully and violently," and was the "servant and agent" of defendants, *held*, that the demurrer was properly overruled.

ACTION to recover damages for personal injuries.

The complaint alleged, among other things, that while defendant's street car was obstructing the passage across Church street in the city of New York, on the 13th of March, 1873, the plaintiff, desiring to cross such street, stepped upon the front platform of the car for the purpose of so doing; "that thereupon the driver of said car or vehicle, who was then the servant and agent and in the employment of the defendant, and engaged in driving such car or vehicle, forcibly, willfully and violently seized the plaintiff and threw her from said car," breaking her leg, and otherwise seriously injuring her, etc. Defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the Special Term, and judgment was entered dismissing the complaint. On appeal the judgment and order were reversed, and defendant's demurrer overruled with leave to defendant to answer within twenty days; not having so done, plaintiff's damages were ordered assessed by a sheriff's jury.

The judgment entered thereon was affirmed by the Common Pleas for the city and county of New York, and defendant appealed.

Waldo Hutchins, for appellant.

O. P. Buel, for respondent.

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MILLER, J. The plaintiff's complaint alleges that one of the cars of the defendant was standing at the corner of Barclay and Church streets in New York city, in such a position as to block up the passage across Church street. That the plaintiff, being desirous of crossing said street, stepped upon the front platform of said car, for the purpose of passing over the same. That thereupon the driver of said car, who was the servant and agent and then in the employment of the defendant, forcibly, willfully, and violently seized the plaintiff, threw her from the said car upon the highway, in consequence of which the leg of the plaintiff was broken, and the plaintiff was otherwise severely bruised and injured.

The averments in the complaint show that the defendant's car blocked up the street, so as to prevent the crossing of the same by foot passengers who might have occasion to pass over. The right of every individual to a free and unrestricted use of a public highway or a street, for the purpose of passing and repassing, is well settled. When such a right is obstructed or infringed upon, I think that it is equally clear that a person who desires to pass across the street would have the right either to remove the obstruction, or if necessary to pass over the same.

While there are occasions when it is indispensable for the cars on street railroads to stop at localities on their route, and sometimes necessarily obstruct a free passage across the street, there is no good reason why a person who desires to cross should wait unreasonably long for the cars to pass, or be compelled at some inconvenience to seek another place for that purpose. Such person has an undoubted right to cross over the platform of the car while thus interfering with his passage for the purpose of getting beyond it, and he is not a trespasser or wrong-doer in so doing. To render such an act a trespass would, I think, be in direct conflict with the principle that public highways and streets are open to all who choose or may desire to use them, and for the benefit of the entire community. The fact that street railroads have rules and regulations, preventing persons from being on the platform, does not, I think, interfere with the right to pass over the same. These rules are intended mainly for the passengers who travel in the cars, and have no application to those who merely use them as a means of avoiding the obstructions which they create to the public, when stopping at places on public streets and thoroughfares. If such a right to pass did not exist, it would rest with these companies to determine in their own discretion, when, where, and for what length of time they shall interfere with the travel of the public, and in fact the entire extent of the obstruction which they are at liberty to interpose in this manner.

The plaintiff, then, was lawfully on the car, when the driver seized

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and threw her from the same, and the question arises whether the act of the driver was one for which the defendant was responsible. It is insisted by the defendant's counsel, that as the defendant gave the driver no express authority to do the act, no authority to do an unlawful act will be presumed, and to sustain this position, reliance is placed upon the case of *Isaacs v. Third Ave. R. R. Co.*, 47 N. Y. 122; S. C., 7 Am. Rep. 418. In the case cited, it appeared that the plaintiff was a passenger in the defendant's car, and desiring to alight passed out upon the platform, and requested the conductor to stop the car, to which he replied that "the car was stopped enough," she answered that "she would not get out until the car had come to a full stop," whereupon he took her by the shoulder with both hands and threw her out, and her leg was broken, by falling upon the pavement. It was held that the act was a wanton and willful trespass, not in the performance of any duty to, or of any act authorized by the defendant, and that the defendant was not liable. It is laid down, in the case cited, that if an act is done by a servant in the business of the master, and within the scope of his employment, the master is liable to third persons for abuse of the authority conferred, and injuries resulting from an error of judgment or mistake of facts by the servant, as well as those resulting from a negligent or reckless performance of his duties. It is said in the opinion of the court, that "an act was done by the conductor completely out of the scope of his authority, which there can be no possible ground, warranted by the evidence, for supposing the defendant authorized, and which it never could be right under any circumstances for the defendant to do." Several grounds are stated, showing that the act was not done by the conductor while engaged in the performance of any duty to the defendant, or of any act authorized by it, but that it was a criminal act, a wanton and willful trespass, and not the natural or necessary consequence of any thing which the defendant had ordered to be done.

The case at bar is not analogous to the case cited, and the rule there laid down has no application here. The demurrer admits all the facts alleged in the complaint, and concedes that the defendant's driver was acting as "the servant and agent, and in the employment of the defendant," when the act complained of was done. It may also be assumed, from his position, that the driver had instructions to keep the platform of the car clear from all passengers, as well as all other intruders, who might be there without right and contrary to the regulations of the company. This no doubt was his regular duty, and it was necessarily intrusted to his judgment to decide whether a person was on the platform in violation of the rules of the company, and he was authorized to remove

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such person. If, without comprehending the precise nature of the legal rights of the defendant, or that the obstruction of the street by the stopping of the cars conferred any privilege upon persons who desired to cross, and supposing and believing that the plaintiff had no such right, and was a trespasser unlawfully there, the driver did the act complained of, it was an error of judgment, a mistake committed in the course of his employment, for the consequences of which the defendant is liable. If it was an abuse of authority conferred which induced him to seize and eject the plaintiff, the same rule is applicable. *Isaacs v. Third Ave. R. R. Co.*, *supra*; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23, 29; S. C., 7 Am. Rep. 293; *Jackson v. Second Ave. R. R. Co.*, 47 N. Y. 274; S. C., 7 Am. Rep. 448; *Meyer v. Second Ave. R. R. Co.*, 8 Bosw. 305.

The averment in the complaint, that the driver "forcibly, willfully, and violently, seized the plaintiff, and threw her from the said car," cannot, I think, be considered as charging that the act was malicious, but is merely an allegation that he acted knowingly and recklessly, in the performance of his duty, using more force and violence than was necessary to accomplish his purpose, for which as we have seen, within the cases cited, the defendant would be answerable.

The order and judgment of the General Term was right, and must be affirmed with costs.

All concur; except FOLGER, J., dissenting.

Judgment affirmed.

SHUFFLIN, plaintiff in error, v. THE PEOPLE.

(62 N. Y. 229.)

Murder — provocation — adultery of wife.

Where a husband, finding his wife in the act of adultery, strikes her with intent to kill, this is murder; to reduce the offense to the grade of manslaughter the blow must have been given in the heat of passion and without intent to inflict death.

INDICTMENT for murder. At the trial the testimony on the part of the prosecution tended to prove that on the 15th of January, 1873, the prisoner's wife was found in a tenement house lying dead on the floor near the stove, nearly naked, covered with bruises and with her scalp torn off.

The plaintiff in error and his mother testified, in substance, that he

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came into the house and went to the bedroom, where his wife was ; that as he reached the door a man ran out ; that he found his wife on the bed with nothing on ; that she was grossly intoxicated ; that he dragged her out into the sitting room and laid her down by the stove ; that the only violence he offered her was to slap her in the face with his open hand ; that she got up and fell upon the stove twice, cutting herself, and bled profusely ; that she got up and went out into the yard naked, and about an hour after he went out and found her lying on the snow ; that he brought her in and laid her down by the stove, and she did not stir afterward ; that he went to bed and slept all night, and in the morning when he awoke he found her dead. Further facts appear in the opinion.

The court charged in substance, among other things, that to establish murder in the first degree there must have been, at the time of the killing, a premeditated design on the part of the slayer to effect the death of the person killed ; that such design, however, might have been formed at the very moment the blows were dealt which accomplished the death ; that the difference between murder and manslaughter was that in the former there must be an intent to kill, in manslaughter such an intent was not necessary ; that the courts look leniently upon a man who slays his wife when caught in the act of adultery, from the excitement consequent upon the discovery and a momentary deprivation of control on his part ; that is what is covered by the heat of passion when there is no intention to kill. He then submitted to the jury the question whether the prisoner committed the act complained of under such circumstances.

The counsel for the prisoner requested the court to charge : " That if the jury believed that the prisoner detected the deceased committing adultery, and thereupon instantly struck her, and from the effect of such blow she died, the killing can only be manslaughter." Also, " that the law regards adultery as so great a provocation, and makes such allowance for the passion which its discovery excites, that it absolutely reduces the grade of the offense of killing to manslaughter, and that in the lowest degree.

The court refused, except as already charged. The prisoner's counsel duly excepted.

Charles W. Brooke, for plaintiff in error. The intention to take life in this State constitutes the distinction between murder and manslaughter. *People v. Johnson*, 1 Park. Cr. 291 ; *People v. Sheriff of Westchester*, id. 659 ; *People v. Austin*, id. 154. Any killing without a design to effect death, unless it is justifiable or excusable, is manslaughter.

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ter only. *People v. Austin*, 1 Park. Cr. 154. The killing by a husband of his wife or her paramour, on detecting them in the act of adultery, is such serious provocation as to reduce the offense from murder to manslaughter. Whart. on Hom. 177, 178; *State v. Samuels*, 3 Jones' Law, 74. If the intent to kill did not affirmatively appear, the offense would be manslaughter merely. 1 Hale's P. C. 473; 1 East's P. C., ch. 5, § 22, p. 237; *People v. Hammill*, 2 Park. Cr. 229; *Wilson v. People*, 4 id. 642. In consideration of the circumstances under which the killing was done, plaintiff in error was guilty of manslaughter only, and that in the lowest degree. Foster, 296; *State v. Samuels*, 3 Jones' Law, 74; 1 Hale's P. C. 486; 1 Hawk. P. C., ch. 31, § 36; Whart. on Hom. 35, 177, 178; Whart. on Cr. L., § 987. If the case comes within any degree of manslaughter it cannot be deemed murder, even if accompanied with some of the circumstances which make up that crime. *People v. Johnson*, 1 Park. Cr. 291; *Darrey v. People*, 10 N. Y. 157, 161, 162; *People v. Johnson*, 1 Park. Cr. 296.

Benj. K. Phelps, district attorney, for defendants in error.

RAPALLO, J. The judge, in charging the jury, instructed them explicitly as to the distinction between murder and manslaughter. That in murder there must be an intent to kill, and that to constitute manslaughter it was not necessary that there should be such intent. He further instructed them that the court looked leniently upon a man who slays his wife, when caught in the act of adultery, from the excitement consequent upon the discovery and a momentary deprivation of control on his part; that that was what was covered by the "heat of passion" when there was no intention to kill, as used in the statutes defining manslaughter. He then submitted to the jury to determine whether they believed the statement which the prisoner made on the subject of the difficulty with his wife, and the circumstances attending it. Whether they believed from the evidence that he caught her in the act of committing adultery, or that the circumstances surrounding the woman justified him in concluding that she was committing adultery, and whether he was under the excitement and in the heat of passion which that discovery would be likely to produce, and did the act under it. The clear purport of the charge was, that if the jury found that the prisoner killed his wife under these circumstances, and without a premeditated design to effect her death, the offense would be manslaughter in some of its degrees.

This, we think, was a correct exposition of the law, and fully covered

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the theory of the defense. No exception was taken by the prisoner's counsel to the charge as delivered, but he made two requests for a further charge, and the refusals to charge as thus requested present the only material exceptions in the case. The first request was to charge, "that if the jury believe that the prisoner detected the deceased committing adultery, and thereupon instantly struck her, and from the effect of such blow she died, the killing can only be manslaughter." This the court refused, except as already charged.

The charge as previously given embraced the proposition requested, with the qualifications only that the killing was done under the excitement and heat of passion, produced by the discovery, and not with intent to kill. We do not think that the prisoner was entitled to have the charge repeated without those qualifications. Furthermore, we agree with the General Term in the opinion that the evidence did not present circumstances to which the charge requested was applicable, but was entirely inconsistent with the hypothesis contained in the request — that is, that the prisoner instantly struck the deceased, and that from the effect of such blow she died. He insisted in his testimony — and in this he was corroborated by his mother, who was the only witness present at the time — that when he discovered his wife in the bedroom, and the man who was with her passed out, he dragged her into the sitting-room and there slapped her on the side of the face with his open hand, and that was all the violence he inflicted; that she was at the time so grossly intoxicated that she could not stand, and in passing around the stove she fell upon it; that she tried to get up and fell again upon the stove; that he then laid her down by the stove; she was in a nude condition. This occurred between nine and ten o'clock at night. That she afterward got up and went into the yard naked; it was a cold night in January; that he, the prisoner, remained sitting by the stove about an hour after she went out, and he then went out after her and found her lying naked in the snow; that he brought her in and laid her by the stove; that he then had more clothes put over her and went to bed; that in the morning she was found dead. He was positive that the only violence he inflicted on her was the slap in the face.

When found in the morning, by the police officers and others, she was lying by the stove dead. There were various bruises on her body; her scalp was torn off and thrown backwards from her forehead to the crown of her head, uncovering the anterior temporal arteries, which were injured and bleeding; she had a cut over the eyebrow and on the lip, and there was a large quantity of blood upon the floor and on the cloth or pillows upon which the head rested; there was also blood upon the snow

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in the yard. A keeper of a drinking saloon testified that about nine o'clock in the morning the prisoner came to his place to drink and told him that his wife was dead, that the night before he had come in, after taking some drinks, and a man ran out of his bed-room, and he commenced licking his wife; that he licked her pretty hard in the room and outside in the yard, then threw water on her and got her into the room again and licked her on the floor and then went to bed to sleep. He then took the witness into the house and exhibited the body to him. Another witness testified that the prisoner, when asked about the scalping, said that it must have been done by kicks.

From this reference to the evidence it appears that the question of fact before the jury was, whether the injuries which caused the death resulted from the deceased falling against the stove by reason of her intoxication as claimed by the prisoner at the trial—in which case he would have been entitled to an acquittal—or whether they were caused by a series of acts of brutality, continued through the night. They could not have found that the death resulted from the hasty blow struck by the prisoner at the beginning of the difficulty. His own evidence entirely rejects that idea. He says that after he slapped her she turned away and then returned, and in passing around the stove fell upon it. Neither of the witnesses say that the slap threw her on the stove.

The second request to charge was, "that the law regards adultery as so great a provocation and makes such allowance for the passion which its discovery excites, that it *absolutely* reduces the grade of the offense of killing to manslaughter, and that in the lowest degree." This the judge refused, except as already charged.

Much of what has been said in reference to the first request is also applicable to this. The judge had already charged all that was required on the subject of the provocation of adultery. But the proposition as a general proposition of law, in the unqualified form in which it is presented by the request, cannot be sustained. In the first place, it does not confine the case to one of sudden killing, immediately following discovery in the act. It might embrace one of a subsequent deliberate killing, out of jealousy or revenge. Foster's Criminal Law, 296; *State v. Samuel*, 8 Jones' Law (N. C.), 74; *Rex v. Kelly*, 2 Car. & Kir. 814. Secondly, it is far too strong in stating that the provocation *absolutely* reduces the grade of the offense. Whether it does or not, must depend upon the circumstances of each particular case. It is often stated in elementary books and in judicial opinions, in general terms, that if a man kill his wife or the adulterer in the act of adultery it is manslaughter. But this is not a proposition of universal application as matter of law, and, al-

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though practically the result indicated would generally follow, cases may be supposed where the crime would still be murder. It cannot be laid down as a rule of law that adultery gives a license to kill either of the offending parties without being guilty of murder. The language often found in the books is sustained by the report of *Manning's Case* in Sir T. Raymond's Reports, p. 212. "The jury found that Manning found the person killed committing adultery with his wife, in the very act, and flung a pointed stool at him, and with the same killed him; and resolved by the whole court that this was but manslaughter; and Manning had his clergy at the bar and was burned in the hand; and the court directed the executioner to burn him gently, because there could not be greater provocation than this." But, in a more accurate report of the same case contained in Ventris, p. 158, under the title of *Maddy's Case*, it appears that the verdict was special; and that the jury also found that the prisoner had no previous malice toward the deceased, and this was an important consideration upon which the judgment turned. TWISDEN, who presided at the trial, said there was a case found before Justice JONES which was the same as this, except that it was found that the prisoner, being informed of the adulterer's familiarity with his wife, said that he would be revenged of him; and, after finding him in the act, killed him, which was held to be murder, which the court said might be so by reason of the former declaration of his intent.

The question in all these cases must necessarily be whether, as stated by BRADY, J., in his charge to the jury, the act was done with intent to kill or in the heat of passion engendered by the sudden discovery, and without intent to kill.

The proposition contained in the second request was defective in not negating the intent to kill, and this omission is fatal to both requests. The killing of a human being with a premeditated design to effect death, even under the extreme provocation of finding him or her in the act of adultery, would, under the statute of this State as it stood at the time of the offense in this case, have been murder in the first degree, and, under the judicial construction which had been put upon that statute, it would have been sufficient if the intent were formed the instant before the killing. By the amendment of 1873, to constitute murder in the first degree the design must be not only premeditated but deliberate. If the killing is intentional, but not deliberate and premeditated, it is murder in the second degree. But, as the law then stood, and still stands, every killing of a human being without the authority of the law was and is either murder in the first or second degree, or manslaughter, or excusable or justifiable homicide. 2 R. S. 656, § 4. Every definition of manslaughter, ex-

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cept when the homicide is unnecessarily committed in resisting an attempt to commit felony, expressly excludes an attempt to kill; and, therefore, to reduce the offense to that grade the proposition should have excluded such intent. Every definition of excusable homicide requires that the killing be by accident, or accident and misfortune, and excludes the idea of an intentional killing. The cases of justifiable homicide are defined, and do not include the case specified in the request. Adultery, though provocation of the gravest character, is still but provocation, it is not justification; and every intentional killing, however extreme the provocation, is and was, under our statute, murder, unless justified as provided in the statute.

For all these reasons, we are of opinion that the requests to charge were properly refused.

None of the other exceptions appear to us to require further attention than they have received in the opinion delivered at General Term. Although there are extenuating circumstances in the case, and a verdict of manslaughter might well have been rendered, there being very slight evidence of an intent to kill, we find no error of law requiring a reversal of the judgment.

Judgment affirmed.

All concur.

Judgment affirmed.

MENEELY, appellant, v. MENEELY.

(62 N. Y. 427.)

Individual names as trade-marks.

Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do any act calculated to mislead.

ACTION by Edwin A. Meneely and George R. Meneely against Clinton H. Meneely and George H. Kimberly, to restrain the defendants from using the name "Meneely" in their business of bell-founding which they conducted in Troy, under the firm name of

"Meneely & Kimberly." The plaintiffs were engaged in the business of bell-founding in West Troy. This business was established by Andrew Meneely, the father of the plaintiffs and of the defendant Clinton H. Meneely. The father, at his death in 1851, bequeathed the business and goodwill to the plaintiffs, charged among other things, with the support of said Clinton H. Meneely, until he should attain to the age of twenty-one years, and also charged with the payment of several specific legacies, including one to Clinton H. of \$3,000. The plaintiffs discharged the obligations imposed by the will and continued the business of bell-founding under the name of "E. A. & G. R. Meneely." Their foundry was known as the "Meneely bell foundry," and their bells became widely known as the "Meneely" bells, and the name of "Meneely" in connection therewith had become a designation or trade-mark of great celebrity and value to the plaintiffs. In 1870, the defendants, Clinton H. Meneely and George H. Kimberly entered into a copartnership for the purpose of manufacturing, at the city of Troy, bells of the same description manufactured and sold by the plaintiffs; the name of the partnership so formed being "Meneely & Kimberly."

The referee found that the defendants, by the use of the name of "Meneely" in the establishment of their bell foundry at Troy, and in manufacturing and selling bells at Troy under the name of Meneely & Kimberly, expected and intended to derive a profit and advantage by reason of the good reputation and celebrity in bell-founding given to that name throughout the country by the said Andrew Meneely and the plaintiffs. That the use of the name of "Meneely" by the defendants, as hereinbefore set forth, is calculated to, and does, mislead persons who are not personally acquainted with the plaintiffs and defendants, nor with the respective locations of Troy and West Troy, and the difference between those places, into the belief that the defendants are the proprietors of the "Meneely bell foundry" carried on by plaintiffs; and such use of the name of Meneely by the defendants is injurious to the plaintiff's business of bell-founding.

And, as conclusions of law, that Andrew Meneely, in his life-time, acquired a property in, and became the owner of the name "Meneely," as a valuable trade-mark in the business of bell-founding. That the plaintiffs, under and by the last will and testament of said Andrew Meneely, succeeded to the rights and property of the said Andrew Meneely, in said name of "Meneely" as a trade-mark in the business of bell founding. And that the defendants have no right to use the name "Meneely" in the business of bell-founding at Troy, to the injury of the plaintiffs. And he directed judgment that an injunction issue restraining

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defendants from using the name and designation "Meneely" in the business of bell-founding at Troy.

The judgment entered on this report was reversed at a General Term of the Supreme Court and plaintiffs appealed.

Johr. H. Reynolds, for appellants. Plaintiffs were entitled to the exclusive use of the name Meneely in their business. *Croft v. Day*, 7 Beav. 84. A man has not a right to use his own name in a business, if the intention or tendency is to injure another or impose upon the public. *Croft v. Day*, 7 Beav. 84; *Sykes v. Sykes*, 3 B. & C. 541; *Burgess v. Burgess*, 17 E. L. and Eq. 257; *Holloway v. Holloway*, 13 Beav. 209; *Clark v. Clark*, 25 Barb. 79; *Howe v. The Howe Machine Co.*, 50 id. 236; *Schweitzer v. Atkins*, 46 L. R. (37 N. S.) 847. The practice of actual and deliberate fraud and deceit by defendants to plaintiffs' injury was not necessary to entitle plaintiffs to the relief demanded. *Hookham v. Pottage*, L. R. (8 Ch. App.) 91; *Glenney v. Smith*, 2 Dr. & Sm. 476; *Croft v. Day*, 7 Beav. 84; *Holmes v. Holmes*, 37 Conn. 278; *Mer. Brit. Co. v. Parker*, 39 id. 450.

Irving Browne, for respondents. Defendants not having been guilty of fraud, dishonesty or deceit in the formation or conduct of their business, this action cannot be maintained. *Corwin v. Daly*, 7 Bosw. 233; *Wolfe v. Burke*, 56 N. Y. 115; *Meyer v. Amidon*, 45 id. 169; *Candee v. Deere*, 54 Ill. 439. A person cannot be restrained from using his own name honestly in his own business, although his name and business shall be identical with that of other parties previously domiciled and at work in the same locality. *Amos. Mfg. Co. v. Spear*, 2 Sand. 607; *Sykes v. Sykes*, 3 B. & C. 541; *Croft v. Day*, 7 Beav. 84; *Rodgers v. Nowill*, 5 M., G. & S. 109; *Holloway v. Holloway*, 13 Beav. 209; *Burgess v. Burgess*, 17 E. L. and Eq. 257; *Clark v. Clark*, 25 Barb. 79; *Edelsten v. Edelsten*, 1 De G., J. & S. 185; *Howe v. Howe Machine Co.*, 50 Barb. 236; *Faber v. Faber*, 49 id. 357; *Schweitzer v. Atkins*, 46 L. J. (37 N. S.) Ch. 847; *Stonebraker v. Stonebraker*, 33 Md. 252; *Helmbold v. Helmbold*, N. Y. Sun, 1872; *James v. James*, L. R., 13 Eq. Cas. 421; *Mer. Brit. Co. v. Parker*, 39 Conn. 450; *Wolfe v. Burke*, 7 Lans. 156; *Laurens v. Laurens*, Brown's Trade-Marks, 402; *Caminade v. Caminade*, id. 402; *Pineau v. Pineau*, id. 403; *Roederer v. Roederer*, id. 329; id. 143, 246, 314.

RAPALLO, J. The injunction awarded by the decision of the referee restrained the defendants from in any way using the name and designa-

tion "Meneely" in the business of bell-founding in the city of Troy. The name of one of the defendants is Meneely, and he was engaged in the business mentioned. The necessary consequence of the injunction was to compel the defendant Meneely either to discontinue his business of bell-founding at Troy or procure it to be conducted in the name of some other person. He was also absolutely prohibited from the use of his own name in his own business, in any way.

The bare statement of the scope of the injunction would seem to be sufficient to show that it ought not to have been granted and that the judgment awarding it was erroneous.

The cases referred to in its support fall far short of sustaining it. If the defendants were using the name of Meneely with the intention of holding themselves out as the successors of Andrew Meneely and as the proprietors and managers of the old established foundry which was being conducted by the plaintiffs, and thus enticing away the plaintiffs' customers, and if with that intention they used the name in such a way as to make it appear to be that of the plaintiffs' firm, or resorted to any artifice, to induce the belief that the establishment of the defendants was the same as that of the plaintiffs, and, perhaps, if without any fraudulent intent they had done acts calculated to mislead the public as to the identity of the establishments and produce injury to the plaintiffs beyond that which resulted from the similarity of name, then the cases referred to sustain the proposition, not that a court of equity would absolutely restrain the defendant Meneely from the use of his own name in any way or form, but simply that the court would enjoin him from using it in such a way as to deceive the public and injure the plaintiffs. The manner of using the name is all that would be enjoined, not the simple use of it; for every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do any thing calculated to mislead. Where the only confusion created is that which results from the similarity of the names the courts will not interfere. A person cannot make a trade-mark of his own name, and thus obtain a monopoly of it which will debar all other persons of the same name from using their own names in their own business.

This principle is fully recognized in the cases cited in the briefs of counsel. They have been so fully commented on in the learned opinion of my brother, MILLER, J., delivered at General Term, that I do not deem it necessary or proper again to review them in detail. A refer-

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ence to a few of them will suffice. In the case of *Croft v. Day*, 7 Beav. 84, the intention of the defendants to imitate the blacking manufactured by the plaintiffs, under the name of Day & Martin, and to sell it as theirs, was apparent. The master of the rolls stated: "My decision does not depend on any peculiar or exclusive right the plaintiffs have to use the name of Day & Martin, but upon the fact of the defendants using their names in connection with certain circumstances, and in a manner calculated to mislead the public and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself to which he is not in fair and honest dealing entitled. * * * He has a right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name. I will not do any thing to debar him from the use of that or any other name calculated to benefit himself in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public." The form of the injunction was settled after argument. It did not restrain the defendants from the use of their names of Day & Martin, but from selling blacking in bottles having labels so contrived as to represent it to be the same as that sold by the plaintiffs. *Rodgers v. Nowill*, 5 Man., Gr. & Scott, 109, was an action for damages. The defendant used not merely the firm name of the plaintiffs, but their trade-mark of a crown with the letters V. and R., on either side, above the name; and the verdict was sustained on that ground.

Sykes v. Sykes, 3 B. & Cr. 541, was a similar action, and decided on the same principle. The plaintiff had adopted the mark, "Sykes patent," which the defendant imitated in order to denote that the goods sold by him were of plaintiff's manufacture; the defendant had never had any patent, and he imitated the plaintiff's stamp.

In *Holloway v. Holloway*, 13 Beav. 209, the defendant did not merely sell his pills as "H. Holloway's Pills," but sold them in boxes and with labels and wrappers made in imitation of those of the plaintiff, and manufactured for the express purpose of deceiving. The court in that case said: "The defendant's name being Holloway, he has a right to constitute himself a vendor of Holloway's pills and ointment; and I do not intend to say any thing tending to abridge that right; but he has no right to do so with such additions to his own name as to deceive the public, and make them believe he is selling the plaintiff's pills and ointment." The injunction in that case was not against selling pills as "Holloway's pills," etc., but against selling them as such put up in boxes, etc., having labels so contrived or expressed as by colorable imitation, or otherwise, to represent them to be the same pills, etc., as were

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sold by the plaintiff. In *Clark v. Clark*, 25 Barb. 79, the plaintiff had adopted a device which contained the name Clark & Co. The defendant's was a copy of the plaintiff's device, except that it contained the name of J. Clark, Jr., & Co. The injunction was sustained as to the device, but not as to the name. In *Faber v. Faber*, 49 Barb. 357, an injunction restraining the defendant from using his own name as a mark upon his pencils, though interfering with a similar business previously established by another person of the same name, was refused, and I find no precedent for such an injunction. See, also, *Burgess v. Burgess*, 17 Eng. L. and E. 257, and *Meriden Britannia Co. v. Parker*, 39 Conn. 450; S. C., 12 Am. Rep. 401. In the case last cited the plaintiff's trademark or stamp was "1847, Rogers Bros., A. 1." The defendant stamped like goods manufactured by him, "C. Rogers Bros., A. 1," and "C. Rogers & Bros., A. 1." The plaintiff prayed for an injunction against the use of the stamps or of any stamp of which the word "Rogers," or "Rogers Bros.," should form the whole or a part. The court granted the injunction as to the stamp and as to the use of the words "Rogers Bros.," but refused to prohibit the use of the name, "Rogers."

In the present case the injunction consists wholly of a prohibition of the use of the name "Meneely" in any way. It is in conflict with all the cases upon the subject. If the evidence showed any attempt by the defendants, by means of catalogues or by any other contrivance, to induce the belief that the firm of Meneely & Kimberly was the successor of Andrew Meneely, or the managers of the plaintiffs' bell foundry, those acts might have been restrained; but no such injunction was granted or asked for. The use of the name "Meneely," in any way, was all that was enjoined, and that was the very thing which should not have been enjoined.

We think that the General Term did right in reversing the judgment and ordering a new trial; and the order must, consequently, be affirmed, with costs, and judgment absolute rendered for the defendants, in pursuance of the stipulation.

All concur; MILLER, J., not sitting.

Order affirmed and judgment accordingly.

Town of Venice v. Woodruff.

TOWN OF VENICE, appellant, v. WOODRUFF.

(62 N. Y. 462.)

Equity — when the cancellation of a written instrument will be decreed. Injunction — restraining transfer of instrument.

Certain town bonds, irregularly issued, were held by the State courts to be void even in the hands of *bona fide* holders; but the United States courts held otherwise. The town brought an action to have said bonds delivered up and canceled and to enjoin the holders of them from transferring them to *bona fide* holders who might sue in the United States courts. *Held*, (1) that the court would not direct the bonds to be canceled, no special ground for equitable relief being shown, and (2) that the court could not restrain the transfer, at least in the absence of proof that the defendants were not themselves *bona fide* holders.

ACTION to have certain bonds, issued by the supervisor and railroad commissioners of the town of Venice, and held by the defendants, delivered up and canceled, and to restrain the defendants from transferring them.

The facts, as found by the referee, were, in substance, these: The bonds in question were twenty-five in number of \$1,000 each, and were issued by said railroad commissioners and the supervisor of the town under the act chap. 375, Laws of 1852, to pay for \$25,000 of the stock of the Lake Ontario, Auburn and New York Railroad Company. Five of the bonds were sold by the supervisor and commissioners for cash, and the residue were transferred by them directly to the company at par to apply in payment of the stock subscribed for; and on receipt thereof, and of the money received for the bonds sold, the company issued to the town a certificate for the stock subscribed for, which the plaintiff still holds. The defendants, holders of the twenty bonds delivered directly to the company, took the same without being informed that they were so delivered. The bonds were issued without the assent of two-thirds of the resident tax payers of the town having been obtained, as required by said act. The referee, upon these facts, directed a dismissal of the complaint. Judgment was entered accordingly.

The General Term affirmed the judgment as to all of the defendants but two, on the ground that the action was barred by the statute of limitations. As to those the judgment was reversed and new trial granted. Plaintiff appealed to this court from so much of the judgment as affirmed judgment below.

D. Pratt, for appellant. The requirements of the statute as to procuring the requisite assents not having been complied with, the bonds

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were void even in the hands of *bona fide* holders. *Starin v. Genoa*, 23 N. Y. 439; *People ex rel. v. Mead*, 24 id. 114; *People ex rel. v. Mead*, 36 id. 224. The court in the exercise of its equitable jurisdiction had the power and it was its duty to grant the relief prayed for in the complaint. 2 Story's Eq. 701, §§ 825, 826, 629, 700; *Peake v. Highfield*, 1 Russ. 559; *N. Y. and N. H. R. R. Co. v. Schuyler*, 17 N. Y. 592; 34 id. 592; *Mayor, etc. v. Pilkington*, 1 Atk. 283. The statute of limitations constituted no defense. *Miner v. Beekman*, 50 N. Y. 338, *People v. Rens. Ins. Co.*, 38 Barb. 336; Story's Eq. Jur., § 828; *Harman v. Remsen*, 23 How. 174; *Conover v. Mayor, etc.*, 14 id. 550; *Erie R. Co. v. Ramsey*, 57 Barb. 449; *Schell v. Erie R. Co.*, 51 id. 363, *Radeliff v. Rowley*, 4 Edw. 653; *Varick v. Edwards*, 11 Paige, 290; *Bartlett v. Judd*, 21 N. Y. 200; *Hubbell v. Medbury*, 53 id. 99. The fact that the bonds were held by defendants severally constituted no objection to plaintiff's maintaining the action. *N. Y. and N. H. R. R. Co. v. Schuyler*, 17 N. Y. 592; *Mayor, etc. v. Pilkington*, 1 Atk. 283; *Campbell v. Mackay*, 1 M. & C. 623; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Fellows v. Fellows*, 4 Cow. 682.

David Wright, for respondents. The Supreme Court, as a court of equity, had no jurisdiction to try the only issue tried. Story's Eq. Jur., § 694; *Allerton v. Belden*, 49 N. Y. 373; *Field v. Holbrook*, 6 Duer, 597; *Cadman v. Kingsland*, 4 Edw. 627; *Grand Chute v. Winegar*, 15 Wall. 374. *N. Y. and N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30. The action was barred by the statute of limitations. Code, § 91, sub. 6; Story's Eq. Jur., § 333; *Conkey v. Bond*, 36 N. Y. 427; *Moore v. Greene*, 19 How. (U. S.) 69; *Bruce v. Telson*, 25 N. Y. 194; 5 Lans 51; *Bertine v. Varian*, 1 Edw. Ch. 343; *Erickson v. Quinn*, 3 Lans 299. The equities are all in favor of defendants. *Gould v. Sterling*, 23 N. Y. 439; *N. Y. and N. H. R. R. Co. v. Schuyler*, 34 id. 59; *Will. Canal Co. v. Hathaway*, 2 Kent's Com. 621, note *b*; *F. and M. Bk. v. B. and D. Bk.*, 16 N. Y. 142; *N. Y. and N. H. R. R. Co. v. Schuyler*, 34 id. 65-73; *Griswold v. Haven*, 25 id. 601; *Williams v. Village of D.*, 3 Lans. 51; *A. & A. on Corp.*, §§ 310, 311. The bonds should not be canceled. Story on Agency, § 264. The fact that the bonds were purchased of the railroad company did not prevent the purchaser from being a *bona fide* holder. *Starin v. Genoa*; *Gould v. Sterling*, 23 N. Y. 439; *M. Bkg. Assn. v. N. Y. and S. W. L. Co.*, 35 id. 505; *Bk. of N. Y. v. Bk. of Ohio*, 29 id. 619; *Bk. of Genesee v. Patchen Bk.* 19 id. 309; *Otter v. Brew. Pet. Co.*, 36 How. 330; *E. N. Y., etc., R. R. Co. v. Lighthall*, 5 Abb. Pr. (N. S.) 458, 481; *Magee v. Barber*, 30 Barb. 246; *De Groff v. Am. L. Thread Co.*, 21 N. Y. 124.

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RAPALLO, J. The referee has found that all of the bonds, which the plaintiff seeks by this action to have delivered up and canceled, were made and issued without the requisite consent of two-thirds of the tax payers of the town. That fact according to the decisions of this court rendered the bonds void, even in the hands of *bona fide* holders. *Starin v. Genoa*, 23 N. Y. 439; *People v. Mead*, 24 id. 114; *Same v. Same*, 36 id. 224.

It was further held in these cases, that the burden of proving the requisite consent of the tax payers rested upon the party seeking to enforce payment of the bonds, and that the affidavit directed by the act under which the bonds purported to be issued, to be filed with the consent, was not evidence of the requisite consent. It is therefore settled by the adjudications of this court, that no recovery can be had in an action upon these bonds, without affirmative intrinsic proof of the requisite consent. The fact being found that such consent was not given, it is clear that a perfect defense to the bonds exists, should an action be brought upon them in any court of this State, either by the present holders of the bonds, or by any person to whom they may be transferred.

Upon this state of facts the question arises, whether an equitable action can be maintained by the town to restrain the holders of the bonds from suing upon or transferring them, and to compel the surrender and cancellation of the instruments.

The cases in which a court of equity exercises its jurisdiction to decree the surrender and cancellation of written instruments are, in general, where the instrument has been obtained by fraud, where a defense exists which would be cognizable only in a court of equity, where the instrument is negotiable, and by a transfer the transferee may acquire rights which the present holder does not possess, and where the instrument is a cloud upon the title of the plaintiff to real estate. Under the chancery system, where a bill of discovery was necessary to establish the defense, the court having acquired jurisdiction of the case for the purpose of discovery, might proceed and award relief, but this ground of jurisdiction no longer exists. It is true that the jurisdiction of the court of chancery has been asserted to decree the surrender of every instrument which ought not to be enforced, whether void at law or not, and whether void from matter appearing on its face, or from matter which must be established by extrinsic proof. *Hamilton v. Cummings*, 1 Johns. Ch. 520—522, 523. But Chancellor KENT in the case cited, in asserting this jurisdiction recognizes the necessity of showing strong grounds for the exercise of the power, and endeavors to reconcile the apparently conflicting English authorities, by adverting to the general principle that the

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exercise of the power is to be regulated by sound discretion, as the circumstances of the individual case may dictate, and that a resort to equity to be sustained, must be expedient either because the instrument is liable to abuse from its negotiable nature; or because the defense not arising on its face may be difficult or uncertain at law; or from some other special circumstances peculiar to the case, and rendering a resort to equity highly proper. And it is now well established that equity will not interpose to decree the cancellation of an instrument, the invalidity of which appears upon its face. Story's Eq., § 700, a.

There must exist some circumstance establishing the necessity of a resort to equity, to prevent an injury which might be irreparable, and which equity alone is competent to avert. If the mere fact that a defense exists to a written instrument were sufficient to authorize an application to a court of equity to decree its surrender and cancellation, it is obvious that every controversy in which the claim of either party was evidenced by a writing could be drawn to the equity side of the court, and tried in the mode provided for the trial of equitable actions, instead of being disposed of in the ordinary manner by a jury.

Whether, therefore, the question be regarded as one of jurisdiction or of practice, it is established, by the later decisions, that some special ground for equitable relief must be shown, and that the mere fact that the instrument ought not to be enforced is insufficient, standing alone, to justify a resort to an equitable action. *Grand Chute v. Winegar*, 15 Wall. 374; *Minturn v. Farmers' Loan and Trust Company*, 3 N. Y. 498; *Perrine v. Striker*, 7 Paige, 598; *Morse v. Hovey*, 9 id. 197; *Field v. Holbrook*, 6 Duer, 597; *Allerton v. Belden*, 49 N. Y. 373; *Reed v. Bank of Newburgh*, 1 Paige, 215, 218.

In the present case, in so far as the invalidity of the bonds results from the want of consent of the tax payers, there is no ground whatever shown for resorting to an equitable action. Not only is the want of the consent a perfect defense at law, but the onus of proving the consent is upon the party seeking to enforce the bond; and the court cannot assume that he will be able to establish a fact that does not exist, and of which there is no documentary evidence. If it be said that the town may, by delay, lose evidence, now existing, which would be available to meet and rebut false testimony, one decisive answer is, that the statutes now provide a summary mode of perpetuating testimony in all cases, and an action is not necessary for that purpose. The case is analogous to those of *Field v. Holbrook*, 6 Duer, 597, and *Allerton v. Belden*, 49 N. Y. 373.

It is urged that the action should be sustained for the purpose of pre-

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venting a transfer of the bonds to a *bona fide* holder. This court has held that such a transfer could not prejudice the plaintiff, as the defense would be available even against a *bona fide* holder. 23 N. Y. 439. But it is said that, although such is the rule in this State, a different rule has been adopted in the courts of the United States, and the bonds might be transferred to a *bona fide* holder, who might sue in those courts. There would be force in this argument, provided it were established in the case that the present holders of the bonds were not *bona fide* holders. In that case it might be proper for a court of equity to prevent their subjecting the town to liability by a transfer of the bonds. But if they are themselves *bona fide* holders, there is no justification for interfering with the right of transfer. In contemplation of law, the transferees would acquire no greater rights than are possessed by the present holders.

The real purpose of the litigation seems to be to prevent a resort to the courts of the United States for the collection of these bonds; and the question is, whether it is the province of a court of equity in a State to interfere for the purpose of preventing a resort to the Federal courts for the enforcement of obligations on the ground that they may be held in those courts to be valid, while, according to the decisions of the State courts, the same obligations are held to be void. I apprehend that the power of a court of equity to decree the surrender and cancellation of instruments has never before been appealed to or exercised for such a purpose. Equity will interfere to control the action of parties, and restrain them from transferring negotiable obligations, on the ground that it is against conscience to allow them to create in their transferee a right or equity which they themselves do not possess. But where the effect of a transfer is not to change in any respect the rights or equities of the parties, I am not prepared to hold that the allegation that the transferee might resort to a tribunal in which a rule of decision prevails, or may prevail, differing from that of the court which is asked to enjoin the transfer, is sufficient to justify the interference asked. The wrong sought to be prevented by such a proceeding is not any wrongful act of any party, but a decision of another court. The facts of the case and the abstract rights of the parties are not changed by the transfer. The greatest effect it can have is to enable a transferee to sue in a court to which the present holder could not resort. This, in general, would not be regarded as any wrong which a court of equity would restrain. If it is a wrong in this case it must be on the assumption that the Federal court will render a decision at variance with the decision of this court. I am of opinion that such an apprehension is not a legitimate ground for the action of a court of equity in restraining a transfer or directing the cancellation of the instrument. There is no finding that the present holders

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are not *bona fide* holders of the bonds. As the judgment entered upon the report of the referee was in favor of the defendants it could not be disturbed unless facts were found showing that the conclusions of law were erroneous. We have held over and over again that the facts showing error in the legal conclusions must be found, and that the appellate court will not search for them in the evidence. In this case the findings are in favor of the *bona fides* of the defendants. As to five of the bonds it is found that they were sold and delivered by the supervisor and railroad commissioner to Hutchinson & Murdock, who paid for them par in cash. This finding is not weakened by the further finding that the money was in the first instance advanced on a pledge of the bonds, which was subsequently converted into a sale. As to the twenty bonds which were issued direct to the railroad company, the referee finds that the holders purchased them without being informed that they had been delivered directly to the company. No fact is found impeaching the *bona fides* of the holders of any of the bonds, and therefore it does not appear that any transfer of them can be made which will confer upon the transferees any greater equities than are possessed by the present holders.

The fact that twenty of the bonds were delivered directly to the railroad company instead of being sold by the railroad commissioners, is relied upon as a ground for granting relief as to those bonds. In the case of *People v. Mead*, 24 N. Y. 124, 125, it seems to be considered that this fact would not constitute a defense, even in the State court, as against a *bona fide* holder of the bonds. But to entitle the town to affirmative equitable relief on that ground, it should have been made to appear that the defendants were not *bona fide* holders; which, as has already been shown, the plaintiff has failed to do.

Another ground urged in support of the claim to equitable relief is, that it is necessary for the purpose of avoiding a multiplicity of suits; and the case of *The New York & New Haven Railroad Co. v. Schuyler*, 17 N. Y. 592, and 34 id. 30, is referred to as an authority in point. But that case was essentially different from the present. There the defendants all claimed shares in the same corporation, which had authority to issue only a limited number; shares had been issued in excess of that limit, and some of them must be rejected. The spurious shares were held to be a cloud upon the title of the holders of the genuine shares, and the corporation was held to be the proper representative of the genuine stockholders to seek the interposition of the court to remove that cloud. Here was a solid ground upon which the plaintiff could found its application for relief. The plaintiff having this standing in court, it was held that all the alleged spurious shareholders were properly joined as defend-

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ants. But jurisdiction was not entertained on the sole ground that the holders of spurious shares were numerous. In the present case there is no question of any cloud upon the title. The plaintiff seeks to have canceled certain written instruments purporting to be obligations for the payment of money, which are held by various independent owners. If 't fails to make out a case which would sustain an action for that purpose against any one of them alone, the mere fact that there are several such holders is not of itself sufficient ground for entertaining the suit. If the facts were such as would have sustained the action against one person had he been the holder of all the bonds, then the case of the New Haven Railroad Company would be an authority in favor of the position that if there were several holders all might be joined as defendants. But it does not support the position, that the mere fact that numerous independent parties hold separate instruments upon which they might bring separate suits is sufficient to justify a court of equity in entertaining an action by the debtor to compel them to litigate their claims in an action in the form which he selects.

Under any circumstances, I am inclined to concur with Judge TALCOTT, in the opinion that a court of equity would not interfere affirmatively to relieve the plaintiff against these bonds, except upon condition that it surrendered what it had received for them. The relief sought is discretionary with the court; and the plaintiff is not entitled to it as a matter of absolute right. Actions of this class are in that respect governed by the same rules which apply to actions for specific performance; and relief will never be granted except upon equitable terms, where the case is such as to call for the imposition of terms. Story's Eq. Jur., §§ 692, 693, 696, and cases cited § 742. But the reasons before given I deem sufficient to sustain the conclusion of the referee dismissing the complaint.

There is great doubt whether the defense of the statute of limitations is available in this case. In respect to the limitation of time it is analogous in principle to an action to remove a cloud upon the title to land; and in such cases I do not understand the rule to be that the statute runs from the time the cloud was first created. See *Miner v. Beekman*, 50 N. Y. 388; *Hubbell v. Medbury*, 53 id. 99; *Arnold v. Hud. R. Railroad Co.*, 55 id. 661.

On the ground that the facts of the case are insufficient to justify the interposition of a court of equity to decree the surrender and cancellation of the bonds, or to restrain their transfer, so much of the judgment as is appealed from should be affirmed, with costs.

All concur; CHURCH, Ch. J., not sitting.

Judgment affirmed.

Kent v. Kent.

KENT v. KENT.

(62 N. Y. 560.)

Statute of frauds — when contracts are void as not to be performed within a year.

An agreement to render services, to be paid for after the employer's death, is not within the statute as an agreement not to be performed within a year.*

ACTION to set aside a conveyance made by Jonathan Kent in his lifetime of real estate and to charge the same with a claim owned by the plaintiff against the estate of said Kent, deceased, arising for work and labor of one S. G. Kent. The facts, so far as necessary to that portion of the decision which is of general interest, were that in 1838 the said Jonathan Kent entered into an agreement with his son S. G. Kent whereby the latter was to work for him and was to receive therefor what the services were worth payable on the death of said Jonathan; in pursuance of this agreement said S. G. Kent remained in the service of his father from 1838 to 1843; that Jonathan died in 1864 intestate without leaving sufficient personal estate to pay the claim of the said S. G. Kent. A suit was brought against the administratrix on the claim and judgment recovered, which was assigned to this plaintiff. The plaintiff brought this action to set aside a conveyance of real estate made by the said Jonathan Kent in his life-time on the ground that the same was fraudulent.

Plaintiff's complaint was dismissed at the trial and this order was affirmed at General Term. Plaintiff appealed.

Jno. W. Dininny, for appellant.

John J. Van Allen, for respondent.

ALLEN, J. The Supreme Court at General Term reversed the decision of the judge at Special Term, but affirmed his judgment upon a ground not considered or made upon the trial, and which was not presented by the record. It was held by the court, at the trial, that the contract, under which the plaintiff's assignee rendered the services mentioned in the complaint, was void by the statute of frauds, and that therefore a right of action existed against the decedent at once, upon their performance, upon a *quantum meruit*. It followed that those services having been rendered in 1845, and the debtor dying in 1864, this action, not having been brought until 1872, was barred. Upon this view of the contract the

* See, also, *Jilson v. Gilbert*, 26 Wis. 637; S. C., 7 Am. Rep. 100.

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judge was entirely right; and the cause of action was barred at the death of Jonathan Kent, the original debtor, and there never was a cause of action against the personal representatives or the heirs at law of the deceased debtor. This clearly resulted from the ruling that the contract for compensation by a testamentary provision was void, as not to be performed within a year from the making thereof. *Shute v. Dorr*, 5 Wend. 204. But the judge erred in holding the contract within the statute making void "every agreement that by its terms is not to be performed within one year from the making thereof." 2 R. S. 135, § 2. The performance of the contract as alleged in the complaint, and offered to prove upon the trial, was not necessarily or by the terms of the agreement postponed for more than one year from the time it was made. It was uncertain as to its duration. No time was agreed upon for service by the assignor of the plaintiffs; and the time for the performance of the agreement by the deceased was not, by the terms of the contract, to be more than one year from the making of the contract. The time of payment depended upon the continuance of the life of the deceased; and the debt might become due at any time. *Trustees of First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; *Plimpton v. Curtiss*, 15 Wend. 386. The statute, as interpreted by courts, does not include agreements which may or may not be performed within one year from the making, but merely those which within their terms, and consistent with the rights of the parties, cannot be performed within that time. If the agreement may consistently with its terms be entirely performed within the year, although it may not be probable or expected that it will be performed within that time, it is not within the condemnation of the statute. *Fenton v. Emblers*, 3 Bur. 1278; *McLees v. Hale*, 10 Wend. 426; *Moore v. Fox*, 10 Johns. 244. *Dresser v. Dresser*, 35 Barb. 573, affirms the same doctrine; but counsel suggested, upon the authority of a list of decisions by the Court of Appeals, in December, 1863, as printed 26 How. Pr. 600, that the decision had been reversed, and the doctrine of the case, as reported by Mr. Barbour, repudiated by this court. The learned counsel was mistaken; the principles decided by the Supreme Court in that case were not reversed or overruled by this court; the cause went down for retrial, and was retried pursuant to that decision; and upon second trial the plaintiff had a verdict and judgment, and the last judgment was reversed by this court upon exceptions taken at the Circuit to the exclusion of evidence and as to the measure of damages. The court did not reconsider the question now under consideration or the validity of the contract, but a new trial was granted, which would have been futile if the contract was absolutely void. Judge EMOTT, alone, questioned

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the reported decision ; and it was sustained by Judge DENIO in a well-reasoned opinion, not reported. I concurred in the decision of *Dresser v. Dresser*, as reported in 35 Barbour, and still believe the rule there laid down to be correct. It is certainly in harmony with the reported decisions. The statute had not then run, or commenced running, at the time of the death of the ancestor of the defendants, and the judgment at Special Term was erroneous, as was substantially adjudged by the court at General Term. It should have been reversed and a new trial granted. It was, however, affirmed, by the application of the statutory limitations governing in actions against the personal representatives of deceased debtors. In this the learned court at General Term erred.

The court then decided that under the circumstances of this case, the limitations prescribed by statute to the time for commencing action against executors and administrators were not applicable. The cause should go back for a retrial, to the end that upon such evidence as the parties may give, and all the circumstances of the case, the legal questions involved may be properly presented.

Judgment reversed and a new trial granted, costs to abide event.

All concur ; MILLER, J., not sitting.

Judgment reversed.

THE WHITNEY ARMS COMPANY v. BARLOW, appellant.

(63 N. Y. 62.)

Corporation — contracts ultra vires.

Where a corporation has fully performed a contract to manufacture and deliver certain articles and brings an action to recover the price thereof, it is no defense that the contract was *ultra vires*.*

ACTION against defendants as trustees of the American Seal Lock Company, a corporation organized under the act of 1848, chap. 40, to enforce the statutory liability to pay the debts of said corporation, because of an alleged failure to make an annual report, as by the act required.

The plaintiff was a corporation organized in the State of Connecticut, "for the purpose of manufacturing every variety of fire-arms and other implements of war, caps, cartridges, balls and like munitions of war ap-

* See *Northwestern Union Packet Co. v. Shaw* (37 Wis. 655), 19 Am. Rep. 781.

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plicable to the use of fire-arms, and all kinds of machinery adapted for the construction thereof and otherwise."

The plaintiff claimed that on the 6th October, 1871, the defendants' corporation entered into a contract with plaintiff by which the latter agreed to manufacture and deliver 20,000 railroad locks, to be paid for sixty days after delivery. Plaintiff made and delivered 10,000 locks under the contract, when, by mutual agreement, the contract was suspended as to the residue. Two notes were given by defendant's company for the purchase-price, at two months, one dated January 24, 1872, the other January 31, 1872. To recover the amount of these notes this action was brought. Defendants alleged as a defense that the contract was not within the corporate powers of the plaintiff.

Judgment was entered for the plaintiff in a verdict and affirmed at General Term.

W. W. MacFarland, for appellant.

D. M. Porter, for respondent.

ALLEN, J. [After deciding that the corporation has substantially complied with the act.] It must be conceded that the manufacturing and vending of "railroad locks" is not within the purposes for which the plaintiff was incorporated, or within the powers conferred by its charter. Neither is such business incidental to the purposes of the incorporation, or in any way necessary to, or as far as appears even an aid in the exercise of the powers conferred upon the plaintiff by its constitution, so that it could be regarded as among the implied powers granted by the legislature and assumed by the corporators.

Did the question now made arise upon an application by the stockholders and corporators to restrain the corporate agents from applying the corporate funds to purposes foreign to the corporation, or engaging in business outside of that for which the company was formed, or on proceedings by the sovereign power to annul the charter for an abuse of the powers granted, or in a proceeding to enforce and for the performance of an executory contract, where, upon a rescission or annulling the agreement, both parties would have the same position as if no contract had been made, the rules of decision would be different from those which must prevail in the present action. In either of the cases suggested it is very likely the courts would be compelled to give full effect to the objection and hold the business unauthorized and a violation of the charter, and a forfeiture of the chartered rights and the contract null, and refuse

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to perform it or give effect to it. The manufacture of the locks, or contract to sell them to the Seal Lock Company, were not acts immoral in themselves or forbidden by any statute, neither *mala in sese* or *mala prohibita*, so as to make the contract illegal and incapable of being the foundation of an action; such a contract as the law will not recognize or enforce, but applying the maxim, *ex facto illicito non oritur actio*, leave the parties as it finds them.

When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created. *Earl of Shrewsbury v. North Staffordshire R. Co.*, L. R., 1 Eq. 593; *Taylor v. Chichester and Midhurst R. Co.*, L. R., 2 Exch. 356; *Bissell v. Mich. C. R. Co.*, 22 N. Y. 258.

Whether the contract as originally made was *ultra vires* is not a very important inquiry at this time. If it was, the State under whose sovereignty it dwells, and by whose act and favor it exists, has no interest in arresting its action for the recovery of moneys equitably due upon a contract fully executed and a work fully accomplished, whatever may be its right to annul its charter. The shareholders, whose confidence has been abused and whose funds have been diverted from their proper use, have a direct interest in reclaiming and restoring to proper custody and applying to legitimate uses the funds which have been diverted and improperly used for purposes *de hors* the legitimate business of the corporation. The plea of *ultra vires* should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong.

Here, as between two corporations, the debtor and creditor corporation, the contract has been fully performed by the creditor, the plaintiff in this action, and the Seal Lock Company has received the full consideration of its promise to pay. The plaintiff has parted with its property to the latter corporation, and unless a legal liability exists on the part of the latter to pay, the plaintiff can neither reclaim the property or recover compensation, and under this technical plea a great wrong will be perpetrated. A purchaser who acquired by contract, and under an agreement to pay for it, the property of a corporation, cannot defeat the claim for the purchase-price by impeaching the right of the corporation to become the owner of the property. One who has received from a

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corporation the full consideration of his engagement to pay money, either in services or property, cannot avail himself of the objection that the contract thus fully performed by the corporation was *ultra vires*, or not within its chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defense to prevail in an action by the corporation.

It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail. The same rule holds *converse*. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation. *Ex parte Chippendale*, 4 D. G., M. & G. 19; *In re National P. B. Build. Soc.*, L. R., 5 Chy. Appeals, 309; *In re Clerk, etc.*, R. C., 4 id. 748; *Fishmongers' Co. v. Robertson*, 5 McG. 131.

The only justification for such a plea by an individual sued upon a contract with a corporation is, that the obligation is not mutual, as the other party, the corporation, would not be bound by it. The objection to such a defense in an action upon an executed contract is given by TINDAL, Ch. J., in the case last cited, in these words: "Upon the general ground of reason and justice, no such answer can be set up. The defendants having had the benefit of the performance by the corporation of the several stipulations into which they entered, have received the consideration for their own promises; such promise by them is, therefore, not *nudum pactum*; they never can want to sue the corporation upon the contract in order to enforce the performance of their stipulations which have been already voluntarily performed, and therefore no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them on the ground of inability of the corporation, which suit they can never want to sustain."

The same principle was adjudged in *R. and B. R. Co. v. Procter*, 29 Vt. 93, Ch. J. REDFIELD saying: "The only wrong in the directors is in having exceeded their powers; the transaction with the defendants, so far as it goes, will tend to restore a portion of the money to its rightful proprietor, and of this the defendants ought not to complain as they are confessedly solicitous to bring the directors of the plaintiff's company back to their legitimate functions." See, also, *Farmer and Millers' Bank v. D. and M. R. Co.*, 17 Wis. 372.

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The same equitable principle was intimated by Ch. J. KENT, in *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Parish v. Wheeler*, 22 N. Y. 494, proceeds and was adjudged upon this general rule, Ch. J. COMSTOCK enunciating the doctrine that "the executed dealings of corporations must be allowed to stand for and against both parties, where the plainest rules of good faith require."

Palmer v. Lawrence, 3 Sandf. Sup. Ct. 161, lays down the proposition in more comprehensive terms. Judge DUER, speaking for the court, says: "The general rule which is fairly deducible from all the cases on this subject is, that a defendant who has contracted with a corporation *de facto* is never permitted to allege any defect in its organization as affecting its capacity to contract or sue." The proposition may not be true in respect to contracts executory and wholly unexecuted; we do not pass upon that. It was decided in the *Steam Navigation Co. v. Weed*, 17 Barb. 378, that when it was a simple question of capacity to contract arising either on a question of regularity of organization or of powers conferred by the charter, a party who has had the benefit of the contract cannot be permitted, in an action founded upon it, to question its validity. Judge PARKER's opinion, to which nothing need be added, is well fortified by the many cases to which he refers and which, aside from the argument of the learned judge, abundantly sustain the judgment. Among the cases referred to and commented upon by Judge PARKER, are *Silver Lake Bank v. North*, *supra*; *State of Indiana v. Woram*, 6 Hill, 37; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Steamboat Co. v. McCutcheon*, 13 Penn. St. 13.

It is very evident, as well upon principle as upon authority, that had this action been against the debtor corporation the objection that the contract was not authorized by the charter of the plaintiff would have been untenable and the plaintiff would have been entitled to recover.

Does the defendant and appellant stand in a different position, or can he avail himself of a defense to the original cause of action of which the corporation could not? There may be defenses personal to the defendant, but objections which go to the foundation of the claim and demand against and the obligation of the corporation are not personal to one sued as trustee upon the statutory liability. The debt must be proved by evidence competent against the defendants. The facts upon which the debt is founded must be proved. The naked admissions of the corporation or judgment against the corporation are not evidence against the trustees. They are *res inter alios acta*; but when facts are proved which would establish the existence of a debt against the corporation, the liability of the trustees for the debt follows upon the proof of the

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other facts upon which the liability is made by statute to depend. A debt necessarily results from the acts of the corporation; and whether such acts are such as, in themselves, create or constitute an obligation, or such as will at law estop the corporation from denying its liability, is not important. The trustees are, by the statute, made *privies* to the acts and doings of the corporation in the transaction of its business resulting in a pecuniary debt or liability. When it is proved that the corporation has received property from others under a promise to pay, under circumstances which the law would adjudge sufficient to charge the corporation for the purchase-price, a debt is established which the trustees cannot dispute, although perchance the corporation might, for any reason, have refused to accept the property; and had it done so no legal liability would have resulted.

In *Jones v. Barlow*, 62 N. Y. 202, we held that the liability of a trustee, upon the failure of the corporation to make the annual report called for by the statute, was co-extensive and concurrent with that of the corporation, *quoad* the debt which was sought to be fixed upon him. That there must be not only an existing debt against the corporation but a debt presently due, and for the recovery of which an action would lie against the corporation; and that if the corporation was not suable by reason of a novation or renewal of the debt, an action would not lie against the trustee. We gave the defendant the benefit of that rule. Applying the same principles here, and for the reasons assigned in the prevailing opinion there given, we are constrained to hold, that if a valid debt exists against the corporation, to which there is no good defense at law or equity in behalf of the corporation, it must be adjudged and held a valid debt where the trustee is sought to be charged with its payment. This necessarily follows as the converse of the decision in *Jones v. Barlow*. The first step is taken in establishing the liability of the trustees where the facts proved would entitle the plaintiff to a judgment against the corporation for the debt in suit. That establishes the existence of a debt against the corporation; and upon proof of the other facts, viz., the trusteeship and default in making the report, the liability of the trustee is proven and judgment must go against him. Other questions may arise in respect to the report of 1873, and we do not pass upon that.

The judgment must be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

MCGARY v. LOOMIS, appellant.

(63 N. Y. 104.)

Negligence — contributory, of child — negligence of parents.

In an action to recover damages for injuries to a child *non sui juris*, occasioned by the negligence of the defendant, *held*, that negligence upon the part of the parents is no defense where it appears that the child had not committed or omitted any act which would constitute contributory negligence in a person of years of discretion. Negligence can only be imputed to the child through the parents, but when the child has done no negligent act the conduct of the parents is immaterial. (*See note, p. 512.*)

ACTION for damages to plaintiff occasioned through the alleged negligence of the defendants. Defendants operated a planing mill in the city of Brooklyn. They used a steam engine from which waste hot water and steam were conducted by a pipe under the sidewalk to a hole inside the curbstone filling it with the hot water. The plaintiff, a child a little over four years of age, and who lived with his parents near by, went out upon the sidewalk, fell into the hole and was severely scalded.

On the trial defendants' counsel moved to dismiss the complaint on the ground of contributory negligence on the part of plaintiff or the parents, which motion was denied, and defendants' counsel excepted.

The court charged, among other things, that plaintiff had a right to be on the sidewalk, and had a right to be at play there. Defendants' counsel excepted to the latter portion, *i. e.*, that he had a right to be at play there.

Said counsel requested the court to charge, "that if the child had not sufficient discretion to see the danger from the hot water by reason of its tender age, then it was negligence on the part of the parents to allow the child to be at this place unattended by a sufficient attendant to protect it from danger." The court refused so to charge, and said counsel duly excepted.

D. P. Barnard, for appellants. Defendants are not liable because of the negligence of the plaintiff. *Hartfield v. Roper*, 21 Wend. 615; *Honegsberger v. Second Ave. R. R. Co.*, 33 How. Pr. 193; *Burke v. B'way and Seventh Ave. R. R. Co.*, 49 Barb. 529. The negligence of plaintiff's parents is a defense to this action. *Hartfield v. Roper*, 21 Wend. 615; *Ihl v. Forty-second St. R. R. Co.*, 47 N. Y. 317. The court erred in charging that plaintiff had a right to be at play upon defendants' sidewalk. *McCarthy v. City of Syracuse*, 46 N. Y. 194.

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Homer A. Nelson, for respondent. Plaintiff was *non sui juris*, and incapable of forfeiting, by his own negligence, his rights to damages for injuries received through the negligence of others. *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 461; *O'Mara v. H. R. Co.*, id. 449; *Ihl v. Forty second St. R. R. Co.*, 47 id. 324. There was no negligence on the part of plaintiff or of his parents. *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 461. Defendants were guilty of gross negligence. *Oldfield v. N. Y. and H. R. R. Co.*, 14 N. Y. 310, 314; *Mangam v. Brooklyn R. R. Co.*, 38 id. 460. Plaintiff could recover in this action, although a trespasser. *Lynch v. Nurdin*, 1 Ad. & E. (N. S.) 29; *Bird v. Holbrook*, 4 Bing. 628.

CHURCH, Ch. J. The question of the defendants' negligence in carrying a steam pipe from their factory under the sidewalk, and discharging the same so as to cause a pool of hot water on and adjacent to the walk, in which the plaintiff was found injured, was properly submitted to the jury, and no exception was taken to the charge on that subject. The defendants' counsel requested the court to charge that if the child had not sufficient discretion to see the danger from the hot water by reason of its tender age, then it was negligence on the part of the parents to allow the child to be at this place unattended by a sufficient attendant to protect it from danger. The plaintiff was about four years of age, and, according to the authorities, must be regarded as *non sui juris*. 21 Wend. 615; 38 N. Y. 461, 449; 47 id. 317. The request was properly overruled. It does not claim that it was negligence *per se* to allow a child four years old to be on the sidewalk, and if it did, such a claim could not be maintained as matter of law; but it seeks to predicate negligence of the parents on the inability of the child to discover the danger from the hot water. If the latter was caused by the negligence of the defendants, as the jury have found, it constituted an obstruction to free passage upon the sidewalk, which the parents were not required to anticipate or guard against. If the child was in a lawful place, the parents were not negligent in omitting to protect it against the wrongful act of the defendants. But the negligence of the parents in this case was not a question. The case was submitted to the jury upon the negligence of the child, and the jury were instructed that if the latter was negligent in getting into the water, he could not recover. If a child, though *non sui juris*, has not committed or omitted an act which would constitute contributory negligence in a person of years of discretion, an injury by the negligence of another cannot be defended upon the alleged negligence of the parents. 47 N. Y. 317. The child be-

ing in a lawful place, and exercising what would be regarded as ordinary care in an adult, is entitled to recover for an injury occasioned by the wrongful act of another, irrespective of the conduct of the parents. It is in cases where the child has done or omitted something which would be regarded in an adult as negligent, that the conduct of the parents, in respect to the degree of care exercised over the child, becomes material, and the reason is that negligence cannot be imputed to the child except through the parents; but when the child has done no negligent act, the conduct of the parents may be regarded as too remote. *Hartfield v. Roper*, 21 Wend. 615, was an instance where the negligence of the parents was material, because the child was injured while sitting in the traveled track of a public highway. Here, as we have seen, the child was in a lawful place, and the question of its negligence was deemed necessary by the court to its recovery. If an act could have been imputed to the child, which in an older person might have constituted negligence, a recovery could still have been had if the parents had been free from negligence, but the latter alternative was not reached and not considered, which was a benefit rather than an injury to the defendants.

A point is made upon an exception to the remark of the judge, that the child had the right to play on the sidewalk. This language was used in connection with the remark that the child had a right to be on the sidewalk, and the whole force of the remark as to the right to play was, that being on the sidewalk, the fact of playing there would not constitute contributory negligence, so as to defeat a recovery. If it did not mean this, it had no relevancy to the case, and was not, for that reason, error. There was no occasion for a charge as to the legal right of children to play on the sidewalk, to the exclusion of or interference with persons passing and repassing, nor was any such idea intended. That it is not unlawful, wrongful or negligent for children on the sidewalk to play, is a proposition which is too plain for comment. The amount of the recovery is not reviewable in this court.

The judgment must be affirmed with costs.

All concur.

Judgment affirmed.

NOTE.—See *Kerr v. Forgue* (54 Ill. 482), 5 Am. Rep. 146 and note; *Lynch v. Smith* (104 Mass. 52), 6 Am. Rep. 188; *Ihl v. Forty-second Street, etc., R. R. Co.* (47 N. Y. 317), 7 Am. Rep. 450; *Kay v. Penn. R. Co.* (65 Penn. St. 269), 3 Am. Rep. 628; *Cosgrove v. Ogden* (49 N. Y. 255), 10 Am. Rep. 361; *Keefe v. Milwaukee, etc., Ry. Co.* (21 Minn. 207), 18 Am. Rep. 393.

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GIBBS v. THE QUEEN INSURANCE COMPANY, appellant.

(63 N. Y. 114.)

Foreign corporation — service on — substituted service.

A statute provided that foreign insurance companies, as a prerequisite to doing business in the State, should designate an attorney therein, upon whom process in suits against such companies might be served. *Held*, that the service of a summons on an attorney so designated gave to the court jurisdiction, so as to enable it to render a judgment valid within the territorial limits and enforceable therein against defendants' property found there.

ACTION upon a policy of fire insurance issued in this State upon property therein by the defendant, a company incorporated under the laws of Great Britain.

The laws of New York (Laws 1853, ch. 466, § 23, as amended by Laws 1862, ch. 367, § 5) require foreign insurance companies, as a prerequisite to doing business in this State, to appoint an attorney, upon whom process of law can be served, and declare that service upon such attorney shall be deemed a valid personal service upon such corporation. The defendant had designated an attorney as thus required, and the summons in this action was served upon him. This appeal was on a motion by defendant to set aside the summons, upon the ground that the defendant, being a foreign corporation, the court had no jurisdiction of its person, and that, as no attachment had been issued, the court had no jurisdiction of its property. The motion was denied at Special Term, and this order was affirmed at General Term, and defendant appealed.

Edward C. James, for appellant.

J. A. Hathway, for respondent.

FOLGER, J. [After deciding that the suit was well commenced without an attachment.] And now the second question in the case is presented. I am aware that, in an international point of view, jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory (Story on Conflict of Laws, § 539), and that the laws of a sovereign extend over persons who are domiciled within his territory, and over property which is there situate (*id.*), and that no sovereignty can extend its process beyond its own territorial limits to subject either persons or property

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to its judicial decisions; and that every exertion of authority of that sort beyond those limits is a mere nullity, and incapable of binding such persons or property in any other tribunals. *Picquet v. Swan*, 5 Mason, 35. Based upon this doctrine there have been repeated decisions in this State, which coincide with decisions in other States and England, that the courts of one State or country will not enforce the judgment of a court of another State or country rendered *in personam* against a defendant who was not served with process within its territorial jurisdiction, and who did not appear in the action, nor in any manner submit himself to the jurisdiction. *Shumway v. Stillman*, 6 Wend. 447, and cases there cited; *Ferguson v. Mahon*, 11 Ad. & Ell. 179; *Smith v. Nicolls*, 5 Bing. N. C. 208. It has been laid down as a principle of natural justice, that no one shall be bound by a judgment who has not been served with process, and that a custom not to summon or give notice to the defendant, was contrary to the first principles of justice and could not be good. *Fisher v. Lane*, 8 Wils. 297; but see S. C., 2 W. Blk. 834, and comment in 4 Bing., *infra*. And so it has been held, that even in the jurisdiction in which the judgment has been rendered, it will be reversed on writ of error brought by a defendant who was not served with process, nor whose property was not attached, who was not an inhabitant of the State, and did not voluntarily appear. *Bodurtha v. Goodrich*, 3 Gray, 508. It is certain, however, that this doctrine has not been always adhered to in the full extent in which it is expressed, for many municipal codes do provide for the bringing of actions against non-resident absent citizens and non-resident absent foreigners, by process not personally served either within or without the jurisdiction, though as to such actions it is held, in some cases, that the effect of such proceedings is purely local, and elsewhere a nullity. *Cavan v. Stewart*, 1 Starkie's N. P. 428, per Ld. ELLENBOROUGH; *Ferguson v. Mahon*, *supra*; *Smith v. Nicolls*, *supra*. But though a nullity elsewhere, may they not be, under certain circumstances, of validity in the territory where entertained? The judgments rendered in them have sometimes been respected in other jurisdictions, and intimation has been given that they might be good against the property of the defendant in the territory where rendered. In *Burrows v. Jemino*, 2 Strange, 733, a determination according to the local laws at Leghorn, though affecting adversely one not having part in the proceedings, was held conclusive. The reasons for the decision are not stated at any length. In *Douglas v. Forrest*, 4 Bing. 686, decrees were pronounced in Scotland against a native thereof, who went out of the jurisdiction before commencement of action and never returned, and had no notice of the proceedings. The decrees or-

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dered him to pay certain sums of money. He had been summoned by posting, according to the law of Scotland. The Court of Common Pleas of England held these decrees consistent with the principles of justice. The ruling, however, was (in terms) confined to a case where the party owed allegiance to the sovereignty which gave the judgment, from being born under it, and from his property being at the time protected by the laws of it. See, also, *Martin v. Nicolls*, 3 Simons,* 458. In *Becquet v. MacCarthy*, 2 Barn. & Ad. 951, a judgment *in personam* got in a British colony against an absent party without notice to him, but by the service according to local law upon the king's attorney-general of the colony, was held not so contrary to natural justice as to be void. But the defendant there had been a resident of the colony in an official capacity. That case, it has been said, has been supposed to go to the very verge of the law. *Donn v. Lippman*, 5 Cl. & Fin. 1; *Smith v. Nicolls*, *supra*. A plea of a judgment of the Admiralty Court of Sierra Leone for same cause of action, got against the defendant therein when he was out of the jurisdiction at the time of the commencement of the suit, and ever after until its termination, and had no knowledge of the proceedings, was held ill. It is mentioned in the decision, as if of some significance, that the defendant had no agent or other person within the jurisdiction upon whom process of the court could be served. And that this fact is of consequence appears from *Hope v. Hope*, 4 De Gex, McN. & G.* 328. In that case the principle is set forth, on which a substituted service is ordered when the defendant is abroad. The question is there stated to be, whether there is any person within the jurisdiction who may be fitly served, and service upon whom may be treated as equivalent to service upon the absent person himself. The case of an agent, managing all the affairs of a defendant who is abroad, and regularly communicating with him thereon, is put as one in which substituted service will be permitted, or where he has an agent in the territory specially managing the particular matter involved. In such cases the service has been deemed good, as the inference is irresistible that the agent is impliedly authorized to accept that particular service, or will communicate the process to his principal. The object of all service is said to be, to give notice to the party on whom it is made, that he may be aware of and may resist what is sought of him, and when that is substantially done, so that the court may feel confident that service has reached him, every thing has been done that is required. In *Hobhouse v. Courtney*, 12 Simons,* 140; Eng. Chy. Rep., 35th vol., p. 119, it is held that where a non-resident defendant has created an attorney in fact to deal with the particular matter afterward in suit, a service on such attorney will be good service upon the principal.

These cases were in chancery, and the orders made in them were authorized by act of parliament, though it is said in *Hope v. Hope* that the authority of the court in that respect had not been extended by the statute. See Kerr on Actions at Law, chap. 4, p. *175. It may be that our Supreme Court has not the authority to direct such substituted service in this case. It need not have; the act of legislature allows it, and is a higher source for the power so to serve and to sue.

Of course these cases are not cited here, as going further than that the service thus made gives jurisdiction of the defendant for the purposes of the action thus commenced, so as to enable a judgment, valid within the territorial limits to which the court is confined, to be enforced therein against any property found there. And it seems to be conceded in *Thompson v. Emmert*, 4 McLean, 96, that a judgment commenced by attachment and rendered without notice to the defendant may be enforced upon all of his property within the State, and that it may be within the power of the State to subject all the property of the defendant within it to the payment of his debts in the mode which the law-making power may deem just. And see *Picquet v. Swan*, *supra*, p. 43. The sovereign has the right to make laws to bind foreigners in relation to their property within his domains; in relation to contracts and acts done therein, and in relation to judicial proceedings, if they implead before his tribunals. Story on Conf. of Laws, § 541. Whether such a judgment would be recognized in another country is not now under consideration.

And now I am prepared to ask, would it not be sufficient to confer jurisdiction upon the Supreme Court over this defendant, in this case, that the defendant had filed, in some proper place in the jurisdiction, an appointment of an agent, specifying that he was authorized to receive for it the very process issued in this case, and that thereby a suit therein might be commenced against it, and that the Supreme Court had ordered such service to be made, and that such service had been made in accordance therewith? Is it not much more effectual to that end, when the legislature of the State has enacted that the defendant, as a prerequisite to doing business in this State, shall designate an attorney or an agent therein upon whom process in any suit to be commenced against it may be served, and that it has designated a person as such agent, and that service of process against the defendant has been made upon him? Is not the enactment of the statute by the legislature a proffer to the defendant of the power to do business in this State, if it will subject itself to the jurisdiction of our courts, and is not the acceptance of that proffer by the defendant a submission to that jurisdiction? If the defendant

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had authorized an attorney to appear for it on the record, in the Supreme Court, in this case, it would have been a voluntary appearance and a submission to jurisdiction, and the court would have obtained jurisdiction of the person and could have rendered a judgment *in personam*. How does it differ in principle that in anticipation of any and all suits which may be brought against it, it nominates a person upon whom service of process against it shall be as effectual as service of the same process upon it? In my judgment the existence of an agent made in that way, for that purpose, and upon such inducement and after such statutory agreement, meets the whole principle upon which rests a substituted service as set forth in the case above cited. The agent is created to manage the matter for it of the reception and transmission of process in suits to be commenced against it, thus making him, in an especial manner, a proper person for a substituted service, as being appointed especially therefor, by the absent party. Indeed, when to avail itself of the conditional privilege of doing business in this State held out to it by statute (see Laws of 1862, *ut supra*), the defendant brings its property here and deposits it with an officer of this State, thus subjecting it to the adverse operation and committing it to the protecting care of the laws of this sovereignty, and designates a person to stand in its place for the lawful and valid personal service of process upon it, why does it not take on a *quasi* allegiance to this sovereignty, which makes it so subject to the laws thereof as that the courts acting in pursuance of enactments to that end may, and do, acquire a jurisdiction over it, co-extensive with the territory with which they act, which is so much a jurisdiction of the person as makes here a valid judgment capable of enforcement upon any property of the defendant to be found within this State? Consider further that it is a corporation, which can act only by a natural person as its agent or officer. A foreign corporation can come into this State with its property, establish its business and make and enforce its contracts here only by a natural person. Is it not, in such case, within the State in *propria persona* for the purpose of the jurisdiction of the courts of the State, and for the purpose of a judgment valid within the territorial limits of the State, if the legislature of the State chooses so to enact? Can it be said to be contrary to the principles of natural justice, that a body which can make a contract only by an agent, shall be bound to take notice by process served upon the same, or a like agent, that it is called into the courts of the State to answer for the non-performance of that contract? I think that such is the result of all the legislation upon this subject, which has been herein passed in review, and that as a consequence the summons in this action was well issued and well

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served, and is the legal commencement of an action against the defendant.

There are cases in this court which are supposed to imply a different doctrine. *McCormick v. The Penn. O. R. R. Co.*, 49 N. Y. 303, is one. There is no conflict. The plaintiff there was a non-resident and the subject of his cause of action was not situate within this State, nor did the cause of action arise here, so that he could not have commenced an action at all against the defendant *in invitum*. Code, § 471. The subject-matter of the action was, however, of a nature that our Supreme Court had jurisdiction of it, and when the parties came voluntarily before it for an adjudication it had jurisdiction of the persons. Again, the defendant in that case was a foreign corporation, but it did not appear that it was doing business in this State so as to have appointed an agent on whom service of process could be made in its stead; so the decision in that case dealt only with the question involved in the facts presented, and its silence upon others may imply no more than that it was not necessary nor discreet to go abroad from the precise matter, and upon which, without any thing else, the case could be satisfactorily disposed of. There was a voluntary general appearance and submission to jurisdiction, and it was needful only to state the effect of that on the objection of the want of jurisdiction. It was the same with *The People v. Central Railroad of N. J.*, 42 N. Y. 283, so far as the question of jurisdiction of the person was there concerned. In *Schwinger v. Hickok*, 53 id. 280, it was held that a personal judgment for a deficiency arising upon a mortgage foreclosure sale could not be rendered against a non-resident who was not served with process in this State, and who had not voluntarily appeared. There was not found there any legislative provision for a substituted service. The opinion seems to concede, that the legislature could have declared that a judgment got against a non-resident, upon service by publication even, might be enforced against all property of the defendant within the State, though it would be *in rem*, and could impose no personal liability. *Hulbert v. Hope Mut. Ins. Co.*, 4 How. Pr. 275, furnishes an able opinion of a learned judge (SILL, J.), and is much relied on by the defendants. That was decided early in 1850, before the amendments to the Code permitting the service of summons on a foreign corporation, when it has no property in this State, and before the legislation of 1853, 1855 and 1862. These amendments and this legislation are so important in the disposition of the questions in this case, that I think nothing more need be said to show that the case in 4 Howard, *supra*, should not hinder the result I have reached. Many other cases are cited by the defendants. It will not be profitable to discuss them in detail. The

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reasons for the decision of this court in this case have been given, and the intelligent practitioner can see wherein I differ from the learned and respected judges who have given variant decisions.*

The order appealed from should be affirmed.

All concur.

Order affirmed.

WELSH v. COCHRAN, appellant.

(63 N. Y. 181.)

Trespass — of officer in execution of process — liability of suitor for. Attorney whose client not bound by acts of.

In an action of trespass for a wrongful seizure of plaintiff's goods made by an officer under a warrant issued against the goods of another at the suit of defendant, *held*, (1) that the defendant was not liable for the wrongful acts of the officer, without proof that he had authorized such acts; and (2) that the fact that defendant's attorney had directed such wrongful acts would not render the defendant liable in the absence of proof of special authority in the attorney.

ACTION to recover damages for an unlawful seizure and conversion of plaintiff's property.

It appeared that the property in question was seized by the United States marshal under and by virtue of a provisional warrant issued in proceedings in bankruptcy against Timothy Kinnen and George Welsh, composing the firm of Kinnen & Co., directing the seizure of their goods; that after an adjudication of bankruptcy the goods were turned over to the assignee and by him sold as the property of said Kinnen & Welsh. The evidence offered to connect defendants with the taking was, in substance, that they were the petitioning creditors in the bankruptcy proceedings, and the warrant was issued at their instance; that

* Since this opinion was written, and since the decision of this case, my attention has been called to the case of *The Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, in which the question here involved is well and fully discussed, and the conclusion reached is the same as that I have come to. Indeed that case goes farther, and it is held that a judgment of a court in one State, got upon the service of process upon the agent therein of a foreign insurance company, is entitled to credit and to be enforced in another State. See also *Copin v. Adamson*, L. R., 9 Exch. 345; S. C., 10 Moak's Eng. R. 492; *Schibsy v. Westenholtz*, L. R., 6 Q. B. 155.—[FOLGER, J.]

the marshal acted in making the seizure under the direction of the attorneys employed by defendants in the said proceedings, one of whom was present at the seizing, and also directions of a general agent of defendants; that after the seizure defendants were notified that a seizure was made, and upon the instruction of said attorneys, that it was customary where goods were seized by a marshal to give a bond, they executed a bond. Such bond was not introduced in evidence, and its form or conditions were not proved. It did not appear that defendants were notified before giving the bond that the goods were claimed by plaintiffs. They were not present at and no direction from either of them in regard to the seizure of the goods in question was proved. Evidence was given tending to show that defendants received their distributive portion with other creditors of the avails of the sales by the assignee.

The court charged, in substance, that defendants were liable for the acts of the marshal in seizing the goods, and refused to submit the question to the jury, to which defendants' counsel duly excepted.

Further facts appear in the opinion.

Judgment was entered in favor of the plaintiff on a verdict and was affirmed at General Term.

B. F. Tracy, for appellants.

Oscar Frisbie, for respondents.

ALLEN, J. There was evidence to go to the jury tending to connect the defendants with the officers in taking and carrying away the chattels of the plaintiffs; but upon the evidence it was a question of fact for the jury, and should have been submitted to them. The warrant issued at the instance of the defendants only authorized the seizure of the goods of the bankrupts named therein, and did not direct the taking the goods of the plaintiffs or from their possession. There was no direction from the defendants to take the property in question or to seize any goods in the possession of the plaintiffs. The defendants were not present at the taking the goods or at the time of their sale, and did not, at any time in person, direct or interfere with the persons committing the trespass upon the plaintiffs. It may be assumed that the defendants put the officers in motion; but the authority from the defendants, which the law would imply, was only co-extensive with that conferred by the warrant, and to do only lawful acts pursuant to the process. The law will not, without evidence, presume an authority from the defendants, regarding them as the promoters and principals in the proceedings, to commit a

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trespass or do any unlawful act. A master is liable in trespass for acts of his servants, commanded or authorized by him. The authority may be express or implied, and a previous command may be proved either by direct evidence or by any legal evidence which will satisfy the jury. Whether a subsequent ratification, a mere approval of the act, will render the master directly liable in trespass is disputed. *Bishop v. Montague*, Cro. Eliz. 824; 2 Greenl. Ev., § 68. If, however, the party, in whose name and for whose benefit a trespass is committed, with full knowledge of the facts sanction the act and appropriate the proceeds of the trespass, it is evidence for the jury from which they may infer a previous command or authority. *Vanderbilt v. Richmond Turnpike Co.*, 2 Comst. 479; *Fox v. Jackson*, 8 Barb. 355; *Brainerd v. Dunning*, 30 N. Y. 211.

The presence of the attorney of the defendants at the time of the seizure and sale of the goods, and his directions to the officers, did not make the defendants liable for the tortious act. In the absence of proof of special authority to an attorney, his acts in directing the levy upon or the taking of goods upon process are in excess of his general powers as an attorney and do not affect or subject his client to liability. *Averill v. Williams*, 4 Den. 295. The acts and directions of the attorney were not evidence against the defendants. Neither did the directions of the general agent of the defendants, without other evidence, connect the defendants with the trespass. *Vanderbilt v. Richmond Turnpike Co.*, *supra*.

There was some evidence that at some time after the seizure the defendants gave a bond in some form to the marshal, but the bond was not produced and it did not appear for what precise purpose it was given, or against what acts it purported to indemnify the marshal and his deputies, if indeed it was a bond of indemnity at all. Had it been produced it would have been for the court to interpret it, and had it proved to be merely an indemnity for serving the warrant as against the bankrupts, it would not have tended to convict the parties to it of a tortious taking of the plaintiffs' goods. *Cronshaw v. Chapman*, 7 H. & N. 911. Not being produced the circumstance of giving any bond was but slight evidence to connect the defendants with the trespass.

The evidence to show that the defendants received to their personal use any part of the proceeds of the goods sold, or that they did any act with knowledge of the facts and that the goods were taken from the possession of the plaintiffs, or that they were claimed by them, as owners, was very slight. And while the whole evidence may have been sufficient to carry the case to the jury it was not of that conclusive char-

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acter as to justify the taking the question from the jury and disposing of it as a question of law, or as a fact established by incontrovertible evidence. It depended upon deductions and inferences from the facts proved and all the evidence in the action.

The judge erred in refusing the request of the counsel for the defendants to submit this question to the jury. *Read v. Hurd*, 7 Wend. 408; *McMorris v. Simpson*, 21 id. 610; *Bay v. Gunn*, 1 Denio, 108; *Thurman v. Wells*, 18 Barb. 500; *Borrodale v. Leek*, 9 id. 611.

The judgment must be reversed and a new trial granted. All concur; except MILLER, J., not voting.

Judgment accordingly.

SWIFT v. THE MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
appellant.

(63 N. Y. 186.)

Insurance — evidence of prior statements as to health.

In an action by a wife to recover the amount of an insurance policy, issued to her upon the life of her husband, held, that evidence of the declarations of the husband made to third persons prior to the insurance, when speaking of an existing disease, was competent upon the question as to the truthfulness of statements made in the application.

ACTION upon a policy of insurance, issued by defendant to plaintiff, upon the life of her husband, W. P. Swift. The defendants alleged misrepresentation and concealment. The policy contained this clause:

"In case the statements made by, or on behalf of, or with the knowledge of, the said assured to said company, as the basis of, or in the negotiations for, this contract shall be found in any respect untrue, this policy shall be null and void."

In the application signed by plaintiff was the following:

"And I do hereby agree that the answers given to the following questions, and the accompanying statements, and this declaration, shall be the basis and form part of the contract or policy between me and the said company; and I warrant such answers and statements as true and correctly stated, and agree that if the same be not so in all respects, the said policy shall be void, and all moneys which may have been paid on account thereof, and all dividend credits which may accrue therefrom shall be forfeited to said company."

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In the application it was stated that the insured "is now in good health and does usually enjoy good health."

"The examining physician testified upon the trial that when examining the insured he called his attention to a question in the application and the answer thereto, to the effect that his mother had died of scrofula, and asked if he had ever had that disease or any symptoms of it, that he was aware of, to which the insured answered: "No, not that I am aware of;" and that this answer to a certain extent influenced the witness in recommending Swift as insurable. The application was made August 20, 1870. A witness was called by the defense, who testified that in the winter of 1869-1870 he noticed that the insured was not looking well, and that he walked lame, and inquired of him what was the matter. The witness was thereupon asked to state what answers the insured gave. This was objected to and objection sustained, to which defendant's counsel duly excepted. Another witness testified that in the fall of 1869 he saw a sore on the right side of the insured. The witness was then asked if the insured told him what was the cause of it, what kind of a sore he called it. This was objected to as hearsay evidence. Defendant's counsel stated the evidence was offered for the purpose of showing that the insured had scrofula prior to the insurance, to his knowledge, and that his statement to the contrary was knowingly false. The objection was sustained, and defendant's counsel excepted. Another witness testified that in the fall of 1869 he noticed that the insured was lame, and that he told witness what was the cause of it. The witness was asked what the insured stated as the cause. This was objected to, objection sustained, and exception taken.

The insured died in May, 1871, of scrofulous disease.

The General Term affirmed a judgment entered for plaintiff on a verdict, and defendant appealed.

George Bliss, for appellant. Evidence of declarations of a party insured, made prior to the insurance to various third parties, when speaking of an existing disease, is proper upon the question of the truthfulness of statements made by him to the examining physician. *Kelsey v. Un. L. Ins. Co.*, 35 Conn. 225; *Aveson v. Kinnaird*, 6 East, 188; *Swift v. Mass. Mut. L. Ins. Co.*, 2 N. Y. Sup. 308; *Mut. B. L. Ins. Co. v. Robertson*, 59 Ill. 123; S. C., 14 Am. Rep. 8; *Wheulton v. Hardisty*, 8 E. & B. 255; *Mech. and Man. Mut. Ins. Co. v. Wash. Mut. Ins. Co.*, 1 Hand (Ohio), 408; *May on Ins.*; *Sweets v. Fairlee*, 6 C. & P. 1; *Higbie v. Guard. Mut. L. Ins. Co.*, 53 N. Y. 603; S. C., 2 Ins. L. J. 761; 8 Alb. L. J. 761; *Matteson v. N. Y. C. R. R. Co.*, 35 N. Y. 487

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The answer of the insured as to the physician was fatally defective. *Huckman v. Fernie*, 3 M. & W. 505; *Cazenove v. Brit. Eq. As. Co.*, 6 C. B. (N. S.) 437; S. C., 5 Jur. (N. S.) 1309; *Morrison v. Muspratt*, 4 Bing. 60; *Maynard v. Rhode*, 1 C. & P. 360; *In re Gen. Prov. L. Ass. Co.*, 18 W. R. 396; *Everett v. Desborough*, 5 Bing. 503; *Corn v. Am. L. Ins. Co.*, 64 Barb. 81.

Geo. Bowen, for respondent. Evidence of statements of the insured as to the state of his health, made to others than the examining physician or the defendant, was not competent. *Rawls v. Am. L. Ins. Co.*, 36 Barb. 357, 364; 27 N. Y. 282, 290; Bliss on Life Ins. (1st ed.), § 374; *Swift v. M. Mut. L. Ins. Co.*, 2 N. Y. Sup. 302. It was immaterial whether the insured concealed the fact that Doctor Hutchins was his family physician. *Redfield v. C. P. Ins. Co.*, 56 N. Y. 354.

FOLGER, J. [After discussing the facts as presented on exception to the denial of a motion for a nonsuit.]

The defendant offered to prove statements, made by the subject insured to different persons prior to the insurance, as to his own health, and the cause of ailments he had and showed, at the time of making those statements. The proof was excluded. It is to be observed that these statements were alleged to have been made prior to the insurance, and in immediate reference to his acts, and to facts in his then bodily condition, and so do not fall within the ruling in *Rawls v. Am. L. Ins. Co.*, 27 N. Y. 290, where it was held that the holder of a life policy was not to be affected by hearsay declarations of the subject of the insurance, made after the policy was issued, of facts alleged to have existed before it was issued. The plaintiff in the case before us had made a written declaration, that the subject of the insurance was in good health at the time of making her application for insurance, and that he did usually enjoy good health. It was made a condition of the contract, that if the statements made by or on behalf of the insured, as the basis of or in the negotiations therefor, should be found to be untrue in any respect, the policy should be void. The testimony which was received in the case tended to show that the subject insured died of a scrofulous disease, and the jury might have so found. Hence an issue in the case, was the real state of health of Swift at the time of the application for the insurance, and whether he was then the subject of scrofula, or had ever had symptoms of it to his own knowledge. He had been asked by the examining physician, in regard thereto, and had answered in the qualified negative, that he was not aware thereof. It

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is plain that if he was aware thereof, the information which he had was of essential importance to the defendants, and it is equally plain that his denial that he was aware thereof was a material representation, and that if it was untrue it was a concealment seriously affecting the validity of the contract. It is equally plain that the defendants had the right to show, not only how the fact was, but that Swift knew how it was. To ordinary apprehension it is a ready, and generally a reasonably conclusive way of showing a person's knowledge of his bodily condition, to prove his declarations concerning it, concurrent with some fact or act in relation thereto. It is conceded that acts, doings and appearance, as that the person was lame, was pale and haggard, was weak, may be shown. It is a rule that when an act is done, to which it is necessary or important to ascribe a motive or a cause, what was said by the actor at the time, from which the motive or cause may be collected, is part of the *res gestæ* and may be given in evidence. *Ambrose v. Clendon*, Cases temp. Hardw. 254; *Bateman v. Bailey*, 5 T. R. 512; *Gilchrist v. Bale*, 8 Watts, 355-358; *Barnes v. Allen*, 1 Keyes, 390; *Caughey v. Smith*, 47 N. Y. 244. And this is so sometimes when the actor is not a party to the suit, as well as sometimes when he is. When words go with an act the nature of which is the subject of inquiry, they are taken as original evidence, because what is said at the time is legitimate, if not the best, evidence of what was passing in the mind of the actor. 1 Phil. on Ev. *185; and see *Thomas v. Connell*, 4 Mees. & Wels. 267, where declarations of a bankrupt were received to show knowledge by him of his insolvency, the fact of his bankruptcy being proven *aliunde*. So when one is lame, or weak, or otherwise in bad bodily plight, his statement as to the cause, character and degree thereof, made at the time of the physical exhibition of the infirmity, would seem to be a legitimate mode of reaching his knowledge of his own condition.

But it is said that testimony of such declarations, in cases like this, is hearsay evidence, and may not be received against another than the actor himself. The cases above cited show that this is not always the case, but that where there is a legal relation between the actor and another, so that the act and the declaration respecting it, do have a legitimate connection with that other, and a natural and legitimate effect upon him and his legal relations with others, the declarations, when a part of the *res gestæ*, may be received in evidence. There is not perfect agreement in the books upon the question, whether the declarations of the subject of a life insurance as to state of health, made to others than the insurers or their agents, may be received in evidence against the

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holder of the policy. One of the earliest cases is *Aveson v. Kinnaird*, 6 East (1805), 188, where it was held that declarations of the wife, whose life was insured, made while she was in bed and seemingly ill, after the application for the insurance, but before the policy had been received by the husband, were properly taken in evidence. They were admitted there on the ground that such declarations were evidence upon the fact of health, and that they were in the nature of a cross-examination of her statements to the medical examiner. *Kelsey v. Univ. L. Ins. Co.*, 35 Conn. 225, relied upon the case in East, *supra*, and held that declarations made before the issuing of the policy were properly received. *Edwards v. Barron*, cited in Ellis on Insurance, * 116, was a case in which declarations made before and after, were received. The soundness of these decisions has been called in question. See *Mulliner v. Guard. Mut. Life Ins. Co.*, 1 T. & C. 448; *Wash. L. Ins. Co. v. Haney* 10 Kan. 525; *The Frat. Mut. Life Ins. Co. v. Applegate*, 7 Ohio St. 292. In the last case it is said that *Aveson v. Kinnaird*, *supra*, has not been acquiesced in, and that the contrary doctrine is held in *Stobart v. Dryden*, 1 M. & W. 615. I think that *Stobart v. Dryden* does not profess to overrule *Aveson v. Kinnaird*, or to establish that the conclusion there arrived at, upon the question there involved, was not correct; though the reasoning indulged in, and the authorities cited there, are criticised. Nor have I been able to discover where any court has held, that the declarations of one whose life has been insured for the benefit of another, made as to his state of health, and made at a time prior to and not remote from his examination by the surgeon of the insurer, and in connection with facts or acts exhibiting his state of health, have been rejected from the evidence, where the issue was as to his knowledge of his own bodily state at that time. There are decisions that declarations, made after the contract of insurance has been effected, may not be put in evidence; but they are put upon the intelligible reason, that after the contract of insurance has been effected, the subject of insurance has no such relation to the holder of the policy, as gives him power to destroy or affect it by unsworn statements. 10 Kan., *supra*; 7 Ohio St., *supra*; *Mulliner v. Guard. Life Ins. Co.*, *supra*; *Rawls v. Mut. Life Ins. Co.*, 27 N. Y. 282. And in some cases it is said that such declarations in relation to acts and facts, made prior to the issuing of the policy, are not a part of the *res gestæ* of those acts and facts. But the remark did not grow out of the facts of the case. It is sometimes asserted that the case last cited, and the same case in the court below 36 Barb. 357, do hold that prior statements are inadmissible. See Bliss on Life Ins., § 372; 1 Bigelow's Life, Accident and Ins. R. 549, 558. But it does not appear from the

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statements of the case in Barbour and Smith 27 N. Y. that the declarations offered were prior to the issuing of the policy; and it does from the statement in Smith that they were subsequent; and so they are shown to have been, by a reference to the case and points deposited in the State Library. It is true that the opinion of the learned judge given in Barbour condemns the introduction in evidence of prior declarations. But as it does not appear that any such were offered the remark was *obiter*; and as it does not appear that they were offered, as having been made in connection with his prior acts, to show the knowledge of the insured at the time of his medical examination, the remark is still less applicable to the question we have in hand. We must conclude that there is no decisive authority against the admission of prior declarations accompanying acts to show knowledge while there is some for it. Upon the principle of the matter, we hold that when made at a time not too long before the application and examination; and when a part of the *res gestæ* of some act or fact, exhibiting a condition of health which they legitimately tend to explain, they are admissible to show knowledge in the subject of the insurance of his physical condition. Statements made by a person while disclosing a wound or sore, as to the cause or nature of it, are evidence, not much weaker than the existence of the wound or sore, of his knowledge of his bodily state. The latter prove that he knew that he was ailing, and no one denies that the proof of them is admissible, to show that he was and that he knew it. The former tend to prove with more or less certainty, as the cause and character of the ailment are more or less in the common and unskilled knowledge of men, that the cause and character of it are known to him. The taker of a life policy from insurers, when he asks payment after the death, is liable to an inquiry into the previous life and condition of the subject insured, at the time of the application for the insurance, or at a prior time not remote therefrom. All facts may be proven which tend to show that condition, because he has a legal relation to them, and they legitimately affect his right to the contract which he has got. As he presents the subject of insurance to the insurers, as one who for him may make answer to their material inquiries, and as one who, to the extent of his knowledge, will make answer thereto truthfully, he has a legal relation to the subject of insurance, and is bound by his answers of material facts, and is affected by his knowledge and his answering according thereto or variant therefrom. Hence it is that any prior fact or act, not too remote, is proof against the policy holder, of knowledge concealed by the subject of the insurance. Hence it is, too, that any statement which is part of the *res gestæ* of such prior fact or act tending to characterize and explain it, is also proof

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thereof, though unsworn to. Facts occurring after the insurance has been effected may be evidence, inasmuch as all facts which are material are competent to be proven. But the subsequent statements of the subject of insurance, not connected with a cotemporary act or fact, are then but hearsay, for in such case the policy holder has no such legal relation to the subject as that the latter may affect him by his unsworn declarations; and the declarations have no such connection with any prior act or fact as to be a part of the *res gestæ* thereof. * * *

For the error in rejecting the statements of Swift tending to show knowledge of his physical state, the judgment must be reversed and a new trial ordered.

All concur; except CHURCH, Ch. J., not voting.

Judgment reversed.

WOOD v. FISK, appellant.

(63 N. Y. 245.)

Surety — on a statutory undertaking — discharge of liability on death of surety.

An undertaking given upon appeal in an action read thus: "We," . . . (naming sureties) "do hereby, pursuant to the statute in such case made and provided, undertake," etc. *Held*, (1) that the obligation was joint and not several; (2) that upon the death of one of the sureties his estate was discharged from liability thereon both in law and in equity; and (3) that the liability of the parties was not affected by the fact that the undertaking was given in pursuance of a statute.

ACTION against Lucy D. Fisk, as executrix of the last will and testament of James Fisk, Jr., deceased, to recover on an undertaking signed by him and another.

In 1867, the plaintiff, Wood, recovered judgment in the Supreme Court against one Belden. An appeal was taken by Belden to the General Term, and for the purposes of such appeal the undertaking here sued on was given, and which, after reciting the judgment, etc., was as follows:

"Now, therefore, we, James Fisk, Jr., of Fifth Avenue Hotel, in the city of New York, and W. B. Bradford, of No. 159 West Twenty-third street, in said city, do hereby, pursuant to the statute in such case made

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and provided, undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal, not exceeding \$500, and do also undertake, that if the said judgment so appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on the said appeal."

The judgment was reversed by the General Term and an appeal was taken by the plaintiff to the Court of Appeals, where the decision of the General Term was reversed and the judgment, as it was originally recovered, was affirmed. Judgment to that effect was duly entered on the 9th day of July, 1873. James Fisk, Jr., died January 7th, 1872. After the judgment of affirmance was entered on the decision of the Court of Appeals an action on the undertaking was commenced and judgment recovered by the plaintiff against Bradford. An execution was issued and returned unsatisfied, and the plaintiff thereupon commenced this action upon the undertaking to recover the amount due on the judgment against Belden, with the costs of the appeal. The court dismissed the complaint and ordered exceptions to be heard at first instance at General Term. The General Term reversed the order, and defendant appealed.

Horner A. Nelson, for appellant. Upon the death of one of two joint obligors, who are merely sureties, the survivor only is liable. *Getty v. Binse*, 49 N. Y. 385; *Pickersgill v. Lahens*, 15 Wall. 140; *U. S. v. Price*, 9 How. 90; *Puckshafer v. White*, 1 J. & S. 267. The contract of a surety is the measure and limit of his liability. *McCluskey v. Cromwell*, 11 N. Y. 593, 601; *Rue v. Alter*, 5 Den. 119; *Benjamin v. Benjamin*, 5 N. Y. 383.

Rastus S. Ransom, for respondent. The obligation of the undertaking was joint and several. *Seacord v. Morgan*, 3 Keyes, 640; Code, § 335; *Morange v. Mudge*, 6 Abb. 243; 3 N. Y. 335. A judicial bond must be construed by reference to the law in pursuance to which it was made. 58 N. Y. 319; 11 id. 598, 560; 3 Abb. Ct. App. Dec. 339; 2 id. 399. As between plaintiff and themselves Fisk and Bradford were not sureties, they were bound by an original contract on their part for a good consideration to pay his judgment if it should be affirmed. *U. S. v. Price*, 9 How. 83; *Thompson v. Blanchard*, 3 N. Y. 335; Chit. on Cont. (9th Am. ed.) 450-452; 43 Barb. 131; *Slingerland v. Morse*, 7 Johns.

468; *Skelton v. Brewster*, 8 id. 376; *Gold v. Phillips*, 10 id. 412; *Rogers v. Kneeland*, 13 Wend. 114; *Farley v. Cleaveland*, 4 Cow. 439; 10 How. 334; 25 N. Y. 486, 487; 2 Abb. Ct. App. Dec. 400.

MILLER, J. The undertaking upon which this action was brought was manifestly a joint obligation on its face, and according to well-settled rules applicable to such cases, the two obligors were mere sureties, and upon the death of one of them his estate was discharged both at law and in equity, and the survivor only was liable. In *Getty v. Binsse*, 49 N. Y. 385; S. C., 10 Am. Rep. 379, it was held that upon the death of one of the makers of a joint promissory note, who was not liable for the debt irrespective of the joint obligation, but who signed the note simply as surety, his estate is absolutely discharged both in law and equity, and the survivors only are liable. The correctness of this rule cannot be doubted. It is true that in the case cited the note was given and taken in that form voluntarily, and not in conformity with any statute, as is the case here; but I am unable to see how that circumstance alters the liability of the defendant in this case, or that the provision of the Code, in pursuance of which the obligation in question was given, in any way affects or controls the plain import of the undertaking. It is true that the Code, under which the undertaking was executed (§§ 334, 335), provides that an undertaking shall be given and the form thereof, but there is nothing in the enactment which demands that it shall be joint or otherwise, or which indicates that it was designed to place any special construction upon the provision cited in reference to the nature or effect of the obligation which might be assumed. Concede that the object of the provision was to give to the party, for whose benefit it was executed, security for the judgment from which an appeal was taken, it by no means follows that this was to be done by placing a construction upon the language used in the instrument which might be executed, different from what it ordinarily would bear, and which would be unwarranted by the terms actually employed.

The object of requiring two sureties to execute the undertaking was to secure the judgment recovered, but not to prescribe language which could be used for such a purpose. It is not to be assumed that the legislature intended to define the effect of any particular words, or to say that in an undertaking, joint in form, the sureties should be severally liable. No such intention is manifest or legitimately to be inferred, and the question as to what the statute intended does not arise, for whatever the intention may have been cannot affect the language employed so as to give a construction to the instrument in contravention of its plain

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meaning. The language must be considered the same as if it had been used in any other instrument, and while proper terms, if inserted, might render sureties in such an undertaking severally liable, there is no sufficient reason for claiming, when they are omitted, that the instrument by a forced and constrained construction can be regarded as different from what it fairly imports. The interpretation given is amply sustained by authority. In *Pickersgill v. Lehens*, 15 Wall. 140, an action brought to compel the executors of an estate to pay the amount of a joint bond which the testator had executed under a statutory provision, it was held that the estate was not liable. It was claimed in the case cited, as it is here, substantially, that a statutory obligation was different in principle, and should be interpreted differently from a contract made by private parties between themselves, as the obligors could not direct the form or elect whether they would accept or refuse it; and the court held that a joint and several bond was authorized, and that in the absence of evidence it must be assumed that the obligor knew the difference as between the different kinds of obligations, and became bound in the way he did because a joint obligation was more advantageous to him. The court say: "It is undoubtedly true, as words of severalty are not employed, that a joint bond is a compliance with the law, but it by no means follows that a joint and several obligation is not an equal compliance with its terms. It is certainly not forbidden, and as the statute is silent on the subject the fair intendment is that either was authorized, and that the court had a right to direct which should be given." An attempted distinction is sought to be made between the case cited and the one at bar, because the instrument required in the former case was of a fixed and settled character upon which the liability of the persons executing it was clearly defined by the principles of the common law. It is not apparent how any such distinction can be applied, and no sufficient reason is shown why the rules referred to in the case cited cannot be invoked in the case now presented. This same principle was also upheld in the case of *The United States v. Price*, 9 How. (U. S.) 90, and there is no distinction between the principle applicable to the case at bar and that laid down in the cases cited. In cases of suretyship, the contract being the measure of the liability, courts will not construe a statute under which such a contract is made in such a manner as to enlarge the obligations of the surety beyond the terms of his contract. *McCluskey v. Cromwell*, 11 N. Y. 593.

It cannot, we think, be claimed that the language of the undertaking was several. The case of *Morange v. Mudge*, 6 Abb. 243, cited by the appellant's counsel, which holds that a similar undertaking is several as

well as joint, is a Special Term decision, and not well considered. The only authority cited by DAVIES, J., who wrote the opinion, to uphold the doctrine laid down, is a case where there was a joint loan of money, which stands upon entirely a different principle from one where sureties sign an obligation in that capacity, as both parties received the benefit of the loan as principals. This is not in any respect analogous, and does not bear upon the question discussed.

It is insisted that the contract was not one of suretyship, but an independent original contract, for a valid consideration, to pay the judgment, if it should be affirmed. The contract of the sureties was, that the appellant should pay all costs and damages, and the judgment, if the same was affirmed. It was for the benefit of the appellant, without any consideration of benefit to the sureties, and they were only bound in the event that the appellant did not pay as he was liable to do. The instrument then was a collateral obligation; a mere contract of suretyship for the benefit of another who was originally, and continued to be, liable to pay, and nothing more nor less than this. It could not have been made more explicit and clear if the undertaking had stated in so many words that the obligors were only sureties. Independent of the fact that this is manifest upon the face of the undertaking, sections 334 and 335 of the Code, in conformity with which the undertaking was executed, expressly provide for "two sureties," thus declaring in direct terms, that the contract is one of suretyship. This would seem to settle any question which might arise in regard to the actual character of the obligation assumed.

We have been referred to some reported cases which, it is claimed, hold a contrary doctrine; but after a careful examination it is apparent that none of them are applicable to an instrument executed in pursuance of a statutory provision and bearing the characteristic features of the one upon which this action was brought. Without reviewing them it is sufficient to say that they all involve the question whether the agreement made was within the statute of frauds, and in most, if not all of them each of the defendants who was prosecuted had made the debts of another their own by a valid agreement founded upon a new and sufficient consideration. There is no new and original consideration of benefit to the defendant here which brings the obligation within the principle of the cases referred to, and renders the obligors principals instead of sureties, independent of the statute which, as we have seen, declares them to be sureties.

Even although the liability of the sureties attach upon the affirmance of the judgment, and an action could then be brought immediately with

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out any demand, it does not affect or change the relationship of the parties as the law has fixed them, or convert the sureties into principals.

It follows that the trial court was right in granting a nonsuit, and the order of the General Term should be reversed and judgment ordered for the appellant upon the nonsuit, with costs.

All concur.

Judgment reversed.

CARDOT, appellant, v. BARNEY.

(63 N. Y. 281.)

Negligence — when assignee in bankruptcy of railroad not liable for injuries occasioned in operating.

The assignee in bankruptcy of a railroad corporation, who operates the road under the order of the court, is not personally liable for an injury caused by the negligence of a servant employed by him, in the absence of evidence that he was negligent in the selection of servants or that he held himself out as operating the road otherwise than as receiver. (*See note, p. 540.*)

ACTION by the plaintiff as executrix to recover damages for the alleged negligent killing of her testator August Cardot.

The defendant was assignee in bankruptcy of the Buffalo, Corry and Pittsburgh R. R. Co., and he was also appointed by the court, special receiver of the estate, franchises, and effects of the corporation, with authority "to employ such assistants, operatives, mechanics, laborers and firemen, as he may deem necessary, to purchase such supplies, to borrow or hire such rolling stock, and to make such running arrangements into connecting lines as he shall deem necessary, and to operate the railroad of said company."

Plaintiff gave evidence tending to prove that at the time of the injuries mentioned in the complaint, and immediately previous thereto, the defendant, claiming to act as assignee, was running and operating the road mentioned in the complaint as a carrier of passengers for hire, and that he transported such passengers over the said road.

"That defendant, so claiming to act as assignee as aforesaid, issued passenger tickets, bearing the name of The Buffalo, Corry and Pittsburgh Railroad Company, for passage over and upon the said road, to be sold by the agents of the defendant. No tickets were issued in the name of the defendant."

That Cardot was a passenger on a train proceeding on said railroad, when the passenger coach in which he was riding was precipitated from a bridge and he was killed. That said accident was caused by the care-

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lessness and negligence of the superintendent of said railroad, and of other persons engaged in operating and maintaining said road, all of whom were employed by said defendant, so claiming to act as assignee as aforesaid, but no evidence was given of any personal carelessness or negligence on the part of the defendant.

Defendant's counsel requested the court to charge, among other things, "that if the defendant, in the exercise of good faith and sound discretion, was operating the railroad and was not guilty of any personal negligence (as distinguished from negligence of his employees), he cannot be held in this action." The court refused so to charge, and defendant's counsel excepted.

The court charged, among other things, that it was to be assumed by them that the defendant was authorized to operate the railroad at the time the plaintiff's testator was killed, and that whether he was exercising a sound discretion in so doing was not a question for them to determine. That the defendant, in operating said railroad, was bound to do so with the same degree of care, and was held to the same responsibility as the law ordinarily imposed upon common carriers of passengers by railway. That it was not necessary, in order to maintain this action, to establish any personal want of care or other personal improper conduct on the part of the defendant.

To these portions of the charge the defendant's counsel excepted.

The jury rendered a verdict for plaintiff. Exceptions were ordered to be heard, at first instance, at General Term. The General Term set aside the verdict and granted a new trial.

Walter W. Holt, for appellant. Defendant was a trustee and is bound by his contracts. Bankr. Act, §§ 15-17; 1 Pars. on Cont. 102; Story's Eq., § 975 a; *Duwall v. Craig*, 2 Wheat. 45; *Marvin v. Stone*, 2 Cow. 781; *Geyer v. Smith*, 1 Dal. 347; *Sumner v. Williams*, 8 Mass. 162; *Pinney v. Johnson*, 8 Wend. 500; *Ferrin v. Myrick*, 41 N. Y. 315; *Ballou v. Farnham*, 9 Allen, 47; *Rogers v. Wheeler*, 2 Lans. 486; Deacon on Bankruptcy, 802; *Edge v. Parker*, 8 B. & C. 701; *Tennant v. Strachan*, 1 M. & M. 378; *Harrison v. Walker*, Peake, 111; *Clark v. Spence*, 4 Ad. & El. 448; *Kinder v. Howarth*, 2 Stark. 354; *Sprague v. Smith*, 29 Vt. 421; *Barter v. Wheeler*, 49 N. H. 9; *Blumenthal v. Brainard*, 38 Vt. 402; *Paige v. Smith*, 99 Mass. 395; *Lamphear v. Buckingham*, 33 Conn. 237. Defendant was responsible for any injury resulting from the want of skill or want of care of the person employed. *Blake v. Ferris*, 1 Seld. 48; *City of Buffalo v. Holloway*, 3 id. 493;

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Pack v. Mayor, 4 id. 222; *Kelley v. Mayor*, 1 Kern. 432; *Rogers v. Wheeler*, 43 N. Y. 598; *Ballou v. Farnam*, 9 Allen, 52; *Michael v. Stanton*, 3 Hun, 462; *Higgins v. W. T. Co.*, 46 N. Y. 23; *Metz v. Buff. C. and P. R. R. Co.*, 58 id. 60. The relation of trustee once established must pervade every transaction respecting the trust property until that relation is terminated. (*De Bevoise v. Sanford*, 1 Hoff. Ch. 192; *Cruger v. Halliday*, 11 Paige, 314; *Diefendorf v. Spraker*, 6 Seld. 246; *Andrew v. N. Y. B. and P. B. S.*, 4 Sand. 175; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Icard v. Duff*, id. 368; *Newton v. Bronson*, 3 Kern. 587; *Beekman v. Bonsor*, 23 N. Y. 298; *Perry on Trusts*, §§ 401, 402; *Moven v. Hays*, 1 Johns. Ch. 339; *In re Lichfield*, 1 Atk. 87. A public officer is responsible for the negligence of subordinates employed, voluntarily or privately, and paid by him and responsible to him. Am. L. Cas. 621; Whart. on Neg., § 288; *Lane v. Cotton*, 1 Ld. Raym. 646; *Nowell v. Wright*, 3 Allen, 166; *Shepherd v. Lincoln*, 17 Wend. 249. Defendant's liability springs from a breach of the legal duty and the cause of action rests in tort. *Orange Bk. v. Brown*, 3 Wend. 158; *Hollister v. Newland*, 19 id. 234; *Burke v. Eells*, 4 How. Pr. 288; *Flynn v. H. R. R. Co.*, 6 id. 308; *At. Mut. Ins. Co. v. McLoon*, 48 Barb. 27; *Nolton v. W. R. R. Co.*, 15 N. Y. 444; *Merritt v. Earle*, 29 id. 115; *P. R. R. Co. v. Derby*, 14 How. (U. S.) 484; *S. World v. King*, 16 id. 469; *Wilton v. M. R. R. Co.*, 107 Mass. 108; *Stevens v. Armstrong*, 2 Seld. 435; *Ballou v. Farnum*, 9 Allen, 52. Public officers are liable for injuries to third persons when they act, or omit to act, contrary to their duty. *Adsit v. Brady*, 4 Hill, 630; *Robinson v. Chamberlain*, 34 N. Y. 389; *Hicks v. Dorn*, 42 id. 47; *Hover v. Barkhoff*, 44 id. 113; *Clark v. Miller*, 54 id. 528; *Amy v. Suprs.*, 11 Wall. 136; *Tracy v. Swartwout*, 10 Pet. 80; *Koontz v. North. B.*, 16 Wall. 196. The same rule applies to corporations. *Storrs v. City of Utica*, 17 N. Y. 104; *Moore v. Westervelt*, 27 id. 234; *Story on Ag.*, § 320; *In re Skeritts*, 2 Hogan, 192; *Sahoay v. Sahoay*, 2 R. & M. 215; *Parker v. Browning*, 8 Paige, 388; *Utica Ins. Co. v. Lynch*, 11 id. 520; *Blumenthal v. Brainerd*, 38 Vt. 402; *Page v. Smith*, 99 Mass. 395.

Sherman S. Rogers, for respondent. The ordinary relations of master and servant did not exist between defendant and the employees and he was not liable for their negligence. S. & R. on Neg., § 176, note c; *Keenan v. Southworth*, 110 Mass. 474; *Ferrin v. Myrick*, 41 N. Y. 815. Defendant in operating the railroad possessed the same immunity from personal liability that a general superintendent or the members of a board of directors would have enjoyed. *Bump on Bankr.*, § 37,

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p. 575, note, and *c. c.*; *Adams v. B. and H. R. R. Co.*, 4 Barb. 99; *Sweatt v. B. and H. R. R. Co.*, 5 id. 234; *In re Cal. Pac. R. R. Co.*, 11 N. B. R. 193; *Ammant v. A. and P. Tr. Co.*, 18 S. & R 210; *A. & A. on Corp.*, § 191, note, and *c. c.*; *Metz v. B. C. and P. R. R. Co.*, 58 N. Y. 61.

ALLEN, J. The defendant is sought to be made liable for the acts and neglects of another, upon the doctrine of *respondeat superior*.

The action can only be maintained by reason of the relation of master and servant between the defendant and the superintendent of the road; and, if that relation existed, it resulted solely from the fact that the defendant had, as receiver and assignee in bankruptcy of the property and franchise of the bankrupt corporation, the management and operation of the railroad, the employment of the necessary servants and agents, with the power to dismiss and change them as he pleased or as should be necessary. The principle that those who in the transaction of their business avail themselves of the services of others, of whose acts they have or may have the benefit, shall also be answerable for acts done in the course of the agency, is well settled, and as applied ordinarily the doctrine is very familiar. The difficulty is in applying the principle to cases where the employer occupies a representative or official capacity and has no individual or personal interest in the property or the business in which the subordinate is employed. The action is not upon contract express or implied, but for negligence, and would lie as well at the suit of any other person as in behalf of a passenger, if the neglect of the superintendent is imputable to the defendant.

I have met with no adjudication directly in point in support of the action; we are left to dispose of the questions presented upon reason of the maxim relied upon.

It was urged upon us at the argument, that unless the defendant was liable the plaintiff was remediless, and, therefore, the action should be sustained. But this argument cannot avail. It has been repeatedly said by learned judges, in like cases, that it proves nothing; and there are many instances in which individuals, injured by the acts of agents, are without remedy—as is the case of injuries incurred by the acts of the employees and agents of public officers—with one or two exceptions, which rest upon peculiar reasons not applicable to the present action. Here no personal neglect is imputed to the defendant, either in the selection of agents or the performance of any duty; constructive negligence, by the act of a superintendent, necessarily and properly employed by him, is relied upon. Public officers performing their duties through the agency and with the assistance of subordinate agents employed by them, whether acting gratuitously or for a compensation, are not answerable

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for the neglect or wrongful act of their subordinates. When acting for a compensation they are regarded as being paid for the services rendered and not for taking the hazard of the acts of those necessarily employed by them. *Lane v. Cotton*, 1 Lord Mansf. 647; S. C., 1 Salk. 17; *Whitfield v. Lord Ledespencer*, Cowp. 754; *Hall v. Smith*, 2 Bing. 156; *Duncan v. Findlater*, 6 Cl. & Fin. 894. Sheriffs are an exception to the rule, for the reason that the poundage and other fees to which they are entitled to for acts done by their deputies is deemed a just equivalent for their responsibilities. *Hall v. Smith*, *supra*. In the performance of their ministerial duties sheriffs employ such and so many deputies as they please and receive the compensation for their services, having at all times the supervision and control of their acts; and it may well be said that the acts of the deputy are performed for and in the business of the sheriff and for his benefit. The position of the defendant and his relation to the agents employed by him are not, in any respect, analogous to the position and relation of the sheriff to those acting for him.

The plaintiff, in her complaint, charges that the defendant was possessed of and was the owner of the railroad, and, as such, was a carrier of passengers for hire; and if that averment had been proven, the case would have been very different from that made by the evidence. The defendant was not individually the owner, or possessed of the property; he had neither a general or special property in the road or its earnings. The property was in the court for management and administration; and the defendant was an officer of the court, obeying its orders and carrying out its directions. His relation to the road and its operation was entirely official, and he had no interest in or control over the earnings, and was removable at the pleasure of the court. He was powerless to protect himself against the hazard of the acts of those he was compelled to employ. His position was analogous to that of a public officer charged with public duties, in the performance of which he is compelled to act in part by others. It is a great hardship, in such cases, to impose upon them the hazards and responsibilities which attach to individuals acting by agents appointed for their own convenience and profit. It would be different if the defendant had sought to do by others that which he expected and was competent to do in person. But such was not the case. The employment of agents was a necessity, and expressly directed by the court; and if in the performance of this part of his duty he was prudent, and selected only competent agents, he had discharged his full duty, and ought not to be held to guarantee the acts of the agents employed. In other words, unless some imperative rule of law exists to the contrary, the defendant should only be held to answer for his own acts and neglects.

There is a substantial agreement of judges as to the reason of the rule making masters liable for the acts of their servants, although in the application of it there may have been differences of opinion, and occasionally room for doubt in border cases. BEST, Ch. J., in *Hall v. Smith*, *supra*, says: "The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it," thus making the benefit and liability reciprocal. The principle was recognized in *Bush v. Steinman*, 1 B. & P. 404, and the defendant held liable for the reason that the work was carried on for his benefit. Lord BROUGHAM, in *Duncan v. Finlater*, *supra*, places the liability upon the ground that what is done by the agent being done for the benefit of the principal, and under his direction, he should be responsible for the consequences of doing it. *Scott v. Mayor of Manchester*, 2 H. & N. 204, was distinguished from *Hall v. Smith*, by the fact that the corporation derived a profit from the carrying on the works. *Rogers v. Wheeler*, 43 N. Y. 598; *Sprague v. Smith*, 29 Vt. 421; *Barter v. Wheeler*, 49 N. H. 9; S. C., 6 Am. Rep. 434, proceed upon the same ground, that the defendants were the owners of the roads, and were bound personally by their contracts; and that the fact was unimportant that they were trustees and acted in a representative capacity. The actions were upon contracts made by the defendants, and, as in the case of executors and administrators, they were held to answer for them. *Ferrin v. Myrick*, 41 N. Y. 815. The legal title to the roads was in the defendants, and they operated them as proprietors, and their liability legitimately resulted from their proprietorship, although the title was in trust for others. As said by Judge PECKHAM, in *Rogers v. Wheeler*, *supra*, they were in no sense receivers or officers of the court. They had assumed to operate the roads, and had made contracts with the public in the course of that business, and there was no principle or policy that would shield them from liability if they failed to perform their engagements. *Barter v. Wheeler*, *supra*, was decided upon the same views of the position of the defendant. *Ballou v. Farnum*, 9 Allen, 47, and *Lamphear v. Buckingham*, 33 Conn. 237, were actions against trustees and mortgagees in trust for the bondholders in possession of and operating the roads as such trustees and mortgagees, to recover for injuries sustained by reason of the negligence of persons employed by them. The defendants were held liable. They were regarded as the owners of the roads, and the real principals, receiving the earnings, and having the benefit of the services of the employees. DREW, J., in *Ballou v. Farnum*, held that the defendants had made themselves liable

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as principals, by the position they had voluntarily assumed, and must take the responsibility, looking for their indemnity to the earnings of the road. The employees were the servants of the defendants, operating the roads in virtue of the title and possession acquired under their mortgages; and whether a road is operated by mortgagees in possession, trustees, lessees or intruders, is not material, so long as they assume to operate the road and take the earnings either for themselves or those they represent. *Blumenthall v. Brainerd*, 38 Vt. 402, was an action upon a contract for the carriage of goods, the defendants being receivers of the road by appointment of the Court of Chancery. A verdict passed against the defendants, but upon exceptions taken a new trial was granted. The court, in considering the question of liability, says that the plaintiff's evidence tended to show that the defendants were managing and controlling a long line of railroad, and conducted and held themselves out as common carriers over that line; and add: "If, in fact, they were common carriers over that railroad, we think that it is no defense to an action at law for a breach of duty or obligation, arising out of business intrusted to them in that relation, that they were running and managing the line of railroad as receivers under an appointment of the Court of Chancery." The court regarded the assumption by the defendants of the extraordinary responsibilities of common carriers as not incompatible with their duties and responsibilities as receivers, and held them to their contracts. It would seem that the business of a carrier was not regarded as within the limits of the duties of the defendant, as receivers, although consistent with that position. The court did not intimate that, in all respects, and in the absence of any contract, a receiver would be subject to all the responsibilities of an owner or proprietor of the road. On the contrary, it is said, "as between a receiver and the parties interested in the trust, the receiver would be responsible for negligence; but he might be liable in a larger or stricter degree of responsibility to other parties." *Paige v. Smith*, 99 Mass. 395, without affirming the soundness of the decision of the case last cited, followed it, in an action against a receiver appointed by the Court of Chancery of the same State, on the ground that it was impossible to accord to the defendants an exemption from the ordinary common-law liabilities of common carriers more extensive than they are allowed in the State in which they were appointed. The statement in this record is, that the defendant claimed to and held himself out as operating the road in his official capacity as receiver and assignee in bankruptcy, and not otherwise; and it is not sought to charge him upon a contract in any form.

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There is good reason that one employing another in his business should be responsible for his acts. The maxim *qui facit per alium facit per se* is in such case properly applied, and all the legal consequences should follow; but I know of no principle upon which a receiver or other officer of a court, merely obeying the orders of the court, having no interest in the prosecution of the work and deriving no profit from it, should be answerable except for his own acts and neglects. The present defendant was expressly authorized to employ all necessary assistants and laborers and operate the road. In the employment of subordinates as well as in the other acts connected with the operation of the road, he acted officially and as the representative of, and by orders from the court, and was only held to diligence and good faith in the performance of any act which he was authorized to do. There is no evidence that he at any time assumed to act otherwise than as receiver or assignee, or held himself out as a carrier of passengers, save as an officer of the court.

If this were otherwise, the law only allows a recovery for the death of a person when caused by some wrongful act, neglect or default; and a party can only be made answerable when the act or neglect is in law his act or neglect. Laws of 1847, ch. 450. The defendant and the superintendent, by whose fault the death of the testator was caused, were in the same employ, both acting by the same authority; and the fact that the latter was subordinate to the former by no means makes him responsible for his acts; the superintendent or other general agent of a railroad, who by authority of the corporation employs and discharges the subordinates, is not the master so as to be made responsible under the doctrine of *respondeat superior*.

I am for affirming the order granting a new trial and giving judgment absolute for the defendant, as stipulated.

All concur; except CHURCH, Ch. J., dissenting, and FOLGER, J., not voting.

Order affirmed, and judgment accordingly.

NOTE.—*Camp v. Barney*, 6 T. & C. 622; 8 C., 4 Hun, 373, was against the same person as the principal case and for a like alleged cause of action. The Supreme Court held that an action does not lie against the receiver of a railroad company carrying on the business by order of the court, for injuries to a passenger caused by the negligence of the employees of such receiver, but that where judgment was obtained against the receiver personally for such injuries, the record might be amended so as to render the judgment one against the receiver as such.

In *Meara's Adm. v. Holbrook*, 5 Am. Rep. 633; 20 Ohio St. 137, it was decided that the receiver operating a railroad is answerable in his official capacity for an injury to a servant employed on the railroad, by reason of the negligence of the receiver or the negligence of his agents, in a position superior to that of the servant.—RER.

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UNION TRUST COMPANY v. THE MONTICELLO AND PORT JERVIS
RAILWAY COMPANY.

(63 N. Y. 311)

Payment — when obligations extinguished by — subrogation.

S. advanced money to a railway company to enable it to pay its past-due coupons under an agreement that he should hold the coupons thus paid as security. The property of the railway was afterward sold under the mortgage given to secure the bonds and coupons, and the proceeds being less than the indebtedness, S., as holder of such coupons, claimed a *pro rata* share with the holders of other bonds and coupons. *Held*, that as the bondholders were ignorant of the arrangement between S. and the company, the coupons when paid became, as to them, extinguished, and that S. was not entitled to share.

ACTION to foreclose a mortgage executed by defendant, The Monticello and Port Jervis Railway Company, to plaintiff, as trustee, to secure the payment of 500 coupon bonds of \$1,000 each, with interest. The facts sufficiently appear in the opinion.

Daniel T. Walden, for appellants. The lien of interest coupons is not affected by detaching them from the bonds. *Sewall v. Brainerd*, 48 Vt. 364; *Miller v. R. W. R. R. Co.*, 40 id. 399. The coupons are outstanding obligations whose payment is secured by the mortgage to plaintiffs. *Champney v. Coope*, 34 Barb. 543; 32 N. Y. 551; *Harbeck v. Vanderbilt*, 20 id. 398; *Graves v. Mumford*, 26 Barb. 94, 101; *Robinson v. Leavitt*, 7 N. H. 100; *Moore v. Beason*, 44 id. 225; *Hatch v. Kimball*, 16 Me. 146; *Holder v. Pike*, 24 id. 437; *Hough v. De Forrest*, 13 Conn. 473; *James v. Johnson*, 6 Johns. Ch. 423; *White v. Knapp*, 8 Paige, 173; *Miller v. R. & W. R. R. Co.*, 40 Vt. 399; *Marvin v. Vedder*, 5 Cow. 671, 674-675; *Banta v. Garro*, 1 Sandf. Ch. 383, 385. The transaction between plaintiffs and Smith was an assignment and not a satisfaction of the mortgage. *Robinson v. Leavitt*, 7 N. H. 100; *Brown v. Lapham*, 3 Cush. 554, 555; *Starr v. Ellis*, 6 Johns. Ch. 393, 396; *Harbeck v. Vanderbilt*, 20 N. Y. 397; *Miller v. R. & W. R. R. Co.*, 40 Vt. 399, 400; *Graves v. Mumford*, 26 Barb. 94. The position of the claimant is like that of an indorsee who has accepted and paid a bill for the honor of the drawer, and he is entitled to the benefit of the mortgage security. 1 Hill. on Mort. 171; *Pratt v. Cank.*, etc., 10 Vt. 294; *Keyes v. Wood*, 21 id. 331; *Belding v. Manby* id. 550; *Jackson v. Willard*, 4 Johns. 43; *Johnson v. Hart*, 3 Johns. Cas. 322; *Olds v. Cummings*, 31 Ill. 188; *Swartz v. Leist*, 13 Ohio (N. S.)

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896; *Herring v. Woodhull*, 29 Ill. 92. The agreement that the claimant should hold the coupon as security is sufficient to preserve the lien under the mortgage in his favor, without reference to an assent of the former holder. *Miller v. R. & W. R. R. Co.*, 40 Vt. 309, 407, 408; *White v. Knapp*, 8 Paige, 178. The holder of the coupons is entitled to recover the amount thereof with interest from the time they became due. *N. Penn. R. R. Co. v. Adams*, 54 Penn. 94; Redf. on Railways, 527, note; *Beaver Co. v. Armstrong*, 44 Penn. 63; *Gelpcke v. Dubuque*, 1 Wall. 206; *Aurora City v. West*, 7 id. 82, 105; *V. & O. R. Co. v. V. & O. R. Co.*, 34 Vt. 1; *Williams v. Sherman*, 7 Wend. 109, 112; 2 Pars. on Bills and Notes, 398.

Henry Day, for respondent.

EARL, J. The Monticello and Port Jervis Railway Company issued 500 bonds of \$1,000 each, with interest coupons attached, payable quarterly, on the first days of January, April, July and October, and it executed and delivered to the plaintiff a mortgage upon its property to secure the payment of the bonds and coupons. Default having been made by the railway company, the plaintiff commenced a foreclosure of the mortgage; and the premises mortgaged brought, on the sale under the decree, less than the amount of the face of the bonds. A reference was ordered in this action, to a referee, to ascertain, among other things, the holders of the bonds and coupons who were entitled to share in the proceeds. It appeared upon such reference that the railway company being unable to pay the coupons due July 1 and October 1, 1872, and January 1, 1873, one A. F. Smith made an agreement with its president to advance the money to pay the coupons due at the dates mentioned, and to hold the coupons for his security. In pursuance of this agreement, he went to the plaintiff, where the coupons were payable, and left with it the money to pay the coupons when presented, it agreeing with him to take and deliver them to him uncanceled, that he might hold them as his security for the money advanced. The holders who presented the coupons for payment generally knew nothing of this arrangement, and supposed when they received the money and delivered up the coupons that they were paid. Smith thus took up 1,500 coupons, 500 at each of the dates mentioned, and now claims to share in the funds *pro rata* with the other holders of bonds and coupons. The referee disallowed his claim, and his decision was sustained both at Special and General Terms.

The coupons were secured by the mortgage, and their detachment from

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the bonds did not deprive the holders of them of the security of the mortgage. That remained security for their payment until paid, whether attached to or detached from the bonds. *County of Beaver v. Armstrong*, 44 Penn. St. 63; *Miller v. R. & W. R. R. Co.*, 40 Vt. 399; *Haven v. Grand Junc. R. R. Co.*, 109 Mass. 88. Here the holders of the coupons did not agree to assign or transfer them to Smith, and did not in fact do so. When they delivered these coupons to the trust company they supposed they were receiving payment of them, and Smith undoubtedly knew this. He, however, intended to take and hold them, and keep them in being as his security for the money advanced. This he could do as against the railway company; and as against it the mortgage could be enforced for his benefit. It had not paid the coupons, was in no way harmed by their payment by Smith, and he advanced the money for its benefit upon the request of its principal officer. But a different rule applies as between Smith and the bondholders. They had a direct interest in having the coupons paid, so as to preserve the value of their security. They delivered them up to the trust company for payment, and supposed they were paid. If they had known the true state of the case, they might, and probably would, have refused to assign the coupons, and to have them kept in life, and thus, by an accumulation of interest, to have impaired the value of their security. And they could have caused a foreclosure of the mortgage for default in the payment of the interest.

If the creditors who now contest Smith's claim had purchased their bonds in the belief that the coupons had actually been paid, there could be no question that Smith would be estopped as against them from claiming that he took a transfer of them, and that they were still secured by the mortgage (109 Mass., *supra*); and I cannot perceive why, upon the facts presented, their present position is not equally strong.

There are many cases where money is paid upon mortgages and judgments by persons not parties to them, in which, whether the security shall be regarded as extinguished, or held to be in force for the benefit of the party paying, depends upon the intent of the party paying. Equity will keep the securities in life in such cases to promote the ends of justice; but not against any person having a superior equity. *Harbeck v. Vanderbilt*, 20 N. Y. 398; *Robinson v. Leavitt*, 7 N. H. 100; *Miller v. Rutland & Wash. Railroad Co.*, *supra*; *James v. Johnson*, 6 Johns. Ch. 423; *Haven v. Grand Junction Railroad Co.*, *supra*.

Here the bondholders did not agree that Smith should take and hold the coupons, and they did not agree that he should have any interest in the mortgage security. To give him the benefit of the security would

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now be detrimental to them, and as between them and him would be inequitable.

I am therefore of opinion that the case was properly disposed of, and that the order should be affirmed with costs.

All concur.

Order affirmed.

DALRYMPLE v. WILLIAMS, appellant.

(63 N. Y. 361.)

Verdict — affidavits of jurors admissible to correct.

The foreman of a jury by mistake announced a verdict different from that agreed to by the jury, and the verdict was so recorded. *Held*, that affidavits of the jurors were competent evidence to prove the mistake.

ACTION for fraud against Williams and another. The foreman of the jury announced as their verdict a general verdict in favor of plaintiff against both defendants, and it was so entered. Upon application, made upon the same day to the judge holding the Circuit, on behalf of defendant Williams, an order to show cause at a day specified, during the same Circuit, why the verdict should not be corrected, was granted. The application was based upon the affidavits of all the jurors stating, in substance, that the verdict as agreed upon by them was in favor of defendant Williams and against the other defendant, for the amount named in the verdict entered, and that the announcement of the foreman was made through mistake and inadvertence. The court, upon hearing under the order to show cause, directed the verdict to be amended so as to conform to the actual finding.

Samuel Hand, for appellant. The court at Special Term had power, upon proper proof, to amend the verdict. Code, § 173; 2 R. S. 343; *Burhans v. Tibbits*, 7 How. Pr. 21, 24, 25, 74; *Clark v. Richards*, 3 E. D. S. 89; *Jones v. Kennedy*, 11 Pick. 125; *Scott v. Galbrath*, 1 Dal. 134; *Cagan v. Eben*, 1 Burr. 383; *Clark v. Lamb*, 6 Pick. 512; *Well v. Cox*, 1 Daly, 515. The affidavits of jurors are competent evidence to prove a mistake in announcing the verdict actually agreed upon. *Cagan v. Eben*, 1 Burr. 383; *Noah v. Dickenson*, 15 Johns. 309; *Ser-*

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gent v. ———, 5 Cow. 106; *Smith v. Oeatham*, 3 Cai. 57; *Thomas v. Chapman*, 45 Barb. 98; *Cochran v. Street* 2 Wash. 79; *Blakley v. Sheldon*, 7 Johns. 82; 1 Am. Dig. 224; *Mayo v. Archer*, 1 Str. 514; *Jackson v. Dickinson*, 15 Johns. 309, 317.

A. M. Bingham, for respondent. It was not proper to receive in evidence the affidavits of the jurors to impeach their verdict for mistake or error as to the merits, or to prove irregularity or misconduct. *Clum v. Smith*, 5 Hill, 560; *Ex parte Caykendoll*, 6 Cow. 58; *People v. Col. Com. Pleas*, 1 Wend. 297; *Jackson v. Williamson*, 2 T. R. 281; *Mullins v. Christopher*, 36 Ga. 584; *Walker v. Comrs., etc.*, 9 Miss. (1 S. & M.) 372; *Bernard v. Young*, 5 Humph. (Tenn.) Verdicts cannot be amended, upon motion, in a matter of substance. *Warner v. N. Y. C. R. R. Co.*, 52 N. Y. 437; *Bemus v. Beekman*, 3 Wend. 667; *Brush v. Kohn*, 9 Bosw. 589; *U. S. T. Co. v. Harris*, 2 id. 72.

ALLEN, J. If the fact alleged is properly before us, there should be no doubt either as to the right of the plaintiff to have or the power of the court to grant the relief demanded. It would be a reproach upon the administration of justice if a party could lose the benefit of a trial and a verdict in his favor by the mere mistake of the foreman of the jury in reporting to the court the result of the deliberations of himself and his fellows. The power of a court of record over its records, and to make them truthful, is undoubted, and has been exercised without question. See cases cited by Judge HARRIS, in *Burhans v. Tibbits*, 7 How. Pr. 21. The question whenever the court is asked to reform its records so as to conform to the truth, is not as to the power, but whether a case is made calling for its exercise.

The material question here is, whether the affidavits of the jurors can be received to show the mistake. If they were properly before the court the fact alleged was clearly established and is uncontradicted, and in addition we have the fact that the judge at the Circuit was satisfied of the mistake, and that the defendant was entitled to the correction asked, else he would have denied the motion altogether or modified the relief demanded, by merely granting a new trial. It was competent to give relief in either form, and had the judge doubted as to the right or the equities of the case he would have only set the verdict aside and put the parties to a new trial.

There are reasons of public policy, why jurors should not be heard to impeach their verdicts, whether by showing their mistakes or their misconduct. Neither can they properly be permitted to declare, with a view

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to affect their verdict, an intent differing from that actually expressed by the verdict as rendered in open court. In early times the pains and penalties visited upon jurors for false verdicts furnished an additional reason why they should not be allowed to impeach them. *Watts v. Brains*, Cro. Eliz. 778 But the rule is well established, and at this day rests upon well-understood reasons of public policy as connected with the administration of justice, that the court will not receive the affidavits of jurymen to prove misconduct on their part, or any act done by them which could tend to impeach or overthrow their verdict. This rule excludes affidavits to show mistake or error of the jurors in respect to the merits, or irregularity or misconduct, or that they mistook the effect of their verdict and intended something different. *Clum v. Smith*, 5 Hill, 560; *Ex parte Caykendoll*, 6 Cow. 53; *The People v. Columbia Common Pleas*, 1 Wend. 107; *Jackson v. Williamson*, 2 T. R. 281; *Davis v. Taylor*, 2 Chitty. 268; *Vaise v. Delaval*, 1 T. R. 11. None of these decisions or the principles upon which they rest are decisive of the precise question now presented. They only decide that the verdict to which the jurors have once assented, and which they have reported to the court, cannot be impeached or set aside upon their declaration or affidavit. But the question is quite different when the allegation is that they have been misunderstood by the court, or erroneously reported to it, and that the entry made is not and was not their verdict. It is not an attempt to reverse their action in the jury-room but to establish it. It is in the nature of an attempt to correct a clerical mistake. Had the jury rendered a sealed verdict, and their clerk or scrivener made a mistake in reducing it to writing, a correction of the writing after it had reached the court and been entered upon the minutes would be no impeachment of the verdict or of the integrity, intelligence or action of the jury. The jury in furnishing proof of the clerical mistake would stand by their agreement and aid in giving effect to their deliberations and determinations. In the case now before us it is merely sought to prove by the affidavits of the jurors that by an accident, without intentional fault, the verdict of the jury was erroneously delivered to and received by the clerk. I am unable to see in this an infringement of the rule forbidding jurors to impeach their verdicts; neither can I perceive serious danger in any practice that may grow up under such an exception to the general rule. Applications of this character will be rare, will be made before the judge presiding at the trial and while the whole subject is fresh in the minds of all, and never will be granted except in cases free from reasonable doubt. Something must always be trusted to the discretion of the judge. Discretion cannot be withheld in all cases because it may

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sometimes be abused. We are not without precedent to justify the reception of and acting upon the affidavits of jurors in this case. In *Cogan v. Edden*, 1 Burr. 383, a verdict wrongly delivered by the foreman was set right upon the affidavits of eight of the jury. *Sargent v. —*, 5 Cow. 106, went farther than the court was asked to go here. Affidavits of the jury were received to show that they were misled and adopted a principle in estimating damages not allowed by law. This was defended and approved in *Ex parte Caykendoll*, *supra*.

In *Jackson v. Dickenson*, 15 Johns. 309, affidavits of jurors were held admissible to show that a mistake had been made in taking their verdict, and that it was entered different from what it was intended. The court draw a distinction between what transpires while the jury are deliberating on their verdict and what takes place in open court in returning their verdict, holding the statements of jurors admissible as to the latter but not as to the former. *Roberts v. Hughes*, 7 M. & W. 399, is like the last case quoted, and affidavits of the jurors were received as to what took place in open court on the delivery of the verdict, to correct it. See, also, *Prussel v. Knowles*, 4 How. (Miss.) 90.

The affidavits were admissible, and they made a clear case for correcting the entry. It would have been unjust to send the parties down to another trial, and as the defendant was not in fault there was no reason for charging him with the costs either of the motion or of the trial.

The order of the General Term must be reversed and that of the Special Term affirmed, with costs of this appeal.

Ali concur; except FOLGER, J., dissenting.

Ordered accordingly.

 BARLOW V. THE SAINT NICHOLAS NATIONAL BANK, appellant.

(63 N. Y. 399.)

Taxes — assessment when not an incumbrance — breach of covenant.

By statute assessors of taxes were required to assess lands and to deliver the completed assessment roll to the board of supervisors, who inserted the amount of tax and delivered the roll with their warrant to the collector. Defendant conveyed land with covenants against incumbrances, after it had been so assessed by the assessors, but before the supervisors had extended the tax. *Held*, that the assessment did not constitute an incumbrance.*

* See *Cochran v. Guild*, 106 Mass. 28; 8 Am. Rep. 296.

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ACTION for an alleged breach of covenant against incumbrance contained in a deed from defendant to plaintiffs of certain premises situate in Westchester county.

The facts sufficiently appear in the opinion. The referees decided that there was no breach of the covenant proved, and directed judgment dismissing the complaint. Judgment was entered accordingly, which was reversed at General Term.

Edward H. Hawke, for appellant. No tax or assessment becomes a lien or incumbrance upon real estate until the amount is ascertained and determined. *Dowdney v. Mayor, etc.*, 52 N. Y. 186; *Kerr v. Tousley*, 46 Barb. 150; *Maurice v. Millen*, 26 id. 41.

Francis Larkin, for respondents. The assessment was an incumbrance upon the farm at the time of the conveyance. *Rundell v. Lakey*, 40 N. Y. 513; *Edwards v. Cogswell*, 1 N. Y. S. C. 416.

ANDREWS, J. The defendant, on the 27th of October, 1868, for the consideration of \$49,000, conveyed to the plaintiffs a farm, situated in the town of Ossining in the county of Westchester, by deed containing a covenant against incumbrances. The assessors of that town, in June of that year, assessed the farm to one Jane Ann Edgerton, the occupant, at the sum of \$18,400, and completed their assessment roll in August, thereafter, as required by law, and delivered it to the supervisor of the town, who delivered it to the board of supervisors of the county at their next annual meeting, commencing November 9, 1868, and the board of supervisors, pursuant to law, extended the taxes thereon, and delivered it with the warrant attached to the collector of the town of Ossining. On the roll the sum of \$386.36 was entered as the tax against Jane Ann Edgerton, upon the assessed value of the farm, and this sum, with the collector's fees, was paid by the plaintiffs, the then owners of the farm, to the collector, January 14, 1869; and they having demanded of the defendant the amount of the tax so paid by them, which the defendant refused to pay, bring this action to recover it.

The question presented is, whether, under the circumstances, there was a breach of the covenant against incumbrances. The plaintiffs base their right to recover in the action solely upon the alleged breach of the covenant; and if any other ground exists upon which they could sustain an action to recover back the money paid in extinguishment of the tax, it is not disclosed in the pleadings and was not suggested upon the trial, and cannot now be considered. The question presented is one of considerable practical importance.

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In *Rundell v. Lakey et al.*, 40 N. Y. 513, the plaintiff, to whom the defendants, intermediate the completion of the assessment roll and the levying of the tax by the board of supervisors, had conveyed certain premises with covenant for quiet enjoyment, was called upon by the collector of the town in which the premises were situated, after the tax had been levied and the warrant for its collection had been issued, to pay it, and at the request of the defendants and upon their agreement to refund the amount to him "in case they were legally liable to pay it," paid the tax, and afterwards brought his action against them to recover the amount paid, and recovered, and the judgment in his favor was affirmed by this court. Five judges concurred in the result. GROVER, J., who delivered the only opinion in the case, places his judgment upon the effect of the agreement considered in connection with the fact that, under the tax laws, the owner of real estate residing in the town or ward where it is situated and to whom it is assessed, is primarily liable for the payment of the tax subsequently imposed under the assessment, although he may have parted with his title, after the completion of the assessment roll by the assessors, and before the levying of the tax by the board of supervisors. HUNT, C. J., and MASON and JAMES, JJ., were of opinion that the plaintiff was entitled to recover independently of the agreement upon the covenant in the deed. DANIELS, J., was for affirmance, upon the ground that the tax could not have been collected by the collector from the defendants, and that they were liable to pay it within the meaning of the agreement. LOTT, J., dissented, and WOODRUFF, J., did not vote. The question presented in this case was not decided, and we are now called upon, in the absence of any controlling adjudication, to decide it upon general principles applicable to the subject. The statute (1 R. S. 388, § 1) declares that all lands and personal estate within this State shall be liable to taxation, subject to the exemptions specified. The general rule is that all property within the State shall bear its part of the public burdens, and the system of general laws relating to taxation is arranged with a view to bring all the taxable property of the State within the reach of the taxing power, and to subject it to the action of boards of supervisors, to which is committed the power of imposing taxes to be raised for town, county and State purposes, upon the property within their respective jurisdictions. For the purpose of ascertaining the property liable to taxation, and the persons liable to be taxed therefor, assessors are elected in each locality, and it is made their duty, at the times and in the manner pointed out by statute, to make and complete an assessment roll, containing, among other things, a description and valuation of the real estate situated within the town, and the lands

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of resident owners are to be assessed to the owners or occupants. 1 R. S., 389, §§ 1, 2. The assessment roll, when completed, is to be delivered by the assessors to the supervisor of the town, and by him to the board of supervisors at their next annual meeting. 1 R. S., 394, § 27. But no lien or incumbrance on the lands assessed is created by the act of the assessors. The assessment is the basis upon which the board of supervisors act in apportioning the tax, but it is, in no sense, the imposition of a charge upon the land described in the roll. This is one of the preliminary steps which result in taxation. So is the election of assessors, and taxation of the lands, within the town is as certain to take place before the assessors commence making the roll as after it is completed. The arrangements of the statute necessarily lead to the imposition of taxes at each annual meeting of the supervisors. The roll, when completed, fixes the valuation of the property to be taxed, but it does not determine the amount of the tax, and the most which can be claimed is that it renders more certain and definite the liability to taxation which, nevertheless, existed before the assessment was made. The language of the covenant in the defendant's deed is, that the premises "are free and clear from all incumbrances whatsoever." The covenant against incumbrances is a covenant *in presenti*, and, like the covenant of seizin, if broken at all, is broken as soon as the deed is executed. 4 Kent's Com. 471; Rawle on Covenants of Title, 89; *Horton v. Davis*, 26 N. Y. 495. The right of action accrues at once, and unless an action will lie immediately there is no breach of the covenant. The covenantee suing upon such a covenant may be restricted to nominal damages where he has not been subjected to actual loss (*Delavergne v. Norris*, 7 Johns. 358; *Hall v. Dean*, 13 id. 105); but the right of action, when it exists at all, is complete the moment the covenant is made. If the plaintiff had brought his action the day after he took his deed could he have maintained it? I think not. The answer would have been perfect, that the entry of the land in the assessment roll constituted no incumbrance.

It is claimed that the tax, when levied by the supervisors, related to the time of the assessment, and that in this view it may be brought within the operation of the covenant. The doctrine of relation is a fiction usually employed to support and protect some equity. If this doctrine can, under any circumstances, be applied to a covenant *in presenti*, so as to make a tax levied after the covenant was made an incumbrance as of the time when the deed containing the covenant was executed, there are equitable considerations which prevent its application in a case like this.

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The annual tax levied by boards of supervisors is designed not only to provide means for liquidating expenses and liabilities incurred before the tax is levied, but also to meet expenses and to discharge liabilities which may be incurred, or which may mature during the year subsequent to the imposition of the tax. The State tax, which is included in the annual tax levy, is to defray the expenses of government for the fiscal year, commencing on the first day of October previous to the time of the meeting of the board of supervisors. To meet the contingent expenses of the county the supervisors are authorized to raise, in advance, such sums as they shall deem necessary for that purpose (1 R. S. 386, § 5), and the superintendents of the poor in each county are required to present to the board of supervisors, at their annual meeting, an estimate of the sum which will, in their opinion, be necessary for the support of the poor during the ensuing year, and the supervisors are required to cause such sum as they may deem necessary for this purpose to be levied and raised by taxation. 1 R. S. 626, § 50. It is the constant practice to include in the tax roll the sums necessary to pay the interest and principal on town and county bonds which may become due and payable during the year succeeding the levy of the tax, and for a variety of town and county purposes, in advance of the expenditure of the money. If the defendants shall be held liable on their covenant to pay the tax in question, they will be compelled to reimburse the plaintiff for taxes imposed on the land for town, county and State purposes, in advance of the expenditure, and of which the plaintiff, as owner of the land, receives, or is supposed to receive, the equivalent. The defendants should be held to such a construction of their covenant as will, consistently with the language employed, secure to the plaintiffs the indemnity which may fairly be supposed to have been contemplated by the parties when the covenant was made. But it would be an unwarrantable extension of the ordinary and natural meaning of the general covenant against incumbrances to hold that it applies to a tax levied after the covenant was made. The plaintiffs could have protected themselves against it by a special covenant, if it was intended that the defendants should pay it, or any part of it, on the basis of an equitable division of the tax.

For these reasons we are of opinion that the order of the General Term should be reversed, and the judgment of the referee affirmed.

All concur; except CHURCH, Ch. J., dissenting.

Order reversed and judgment accordingly.

Gibson v. Erie Railway Company.

GIBSON v. ERIE RAILWAY COMPANY, appellant.

(63 N. Y. 449.)

Master and servant — injury to servant.

A conductor on defendant's railroad was knocked from a freight train and killed by a projecting roof of defendant's depot. He was familiar with the road, had passed over it daily for a long time, and the roof had not been altered after he entered the defendant's employ. *Held*, that the company was not liable.

ACTION by an administratrix, to recover damages for the alleged negligent killing of one Parker, plaintiff's intestate.

The deceased, at the time of the accident, was a freight conductor in defendant's employ, and was in charge of a freight train going east from Buffalo. Arriving at Attica, the train stopped at the west end of the station, and Parker left the train and went into the depot. The train started up. Parker came out, caught hold of a passing car, and began to climb up to the top by the ladder at the side. He was struck by the projecting roof of the depot and killed. The track was ten feet ten inches from the side of the building. The roof projected beyond the building eight feet two inches, and was twelve feet four inches above the track. The car was nine feet six inches high. The roof had been in the condition it then was for twenty years. The deceased had been upon the road as brakeman and conductor for seven years, passing over the road once or twice a day, and had lived at Attica eighteen or twenty years. It was proved that the usual place for the conductor to ride between stations was in the caboose. There was no evidence that it was any part of his duty as conductor to get on top of the cars, or that his doing so at the time of the accident had any necessary connection with his duties.

At the close of plaintiff's evidence, and at the close of all the evidence, defendant's counsel moved for a nonsuit upon the ground that no actionable negligence on the part of defendant had been shown, and that the evidence showed negligence on the part of the deceased. The motion was denied, and defendant's counsel duly excepted. The Supreme Court affirmed a judgment in favor of plaintiff entered upon a verdict and defendant appealed.

E. C. Sprague, for appellant. The court erred in charging that it was for the jury to decide whether the intestate in ascending the car when in motion was in the discharge of his duty. *Greenleaf v. Birth*, 9 Pet. 292; *Chandler v. Van Roeder*, 24 How. 224; *People v. Police*

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35 Barb. 651; *Herring v. Hoppock*, 15 N. Y. 409; *People v. Cook*, 8 id. 67; *Courtney v. Baker*, 37 N. Y. Sup. 249; *Sprong v. B. A. R. R. Co.*, 60 Barb. 30; *Fitch v. Allen*, 98 Mass. 572. This action could only be sustained on the ground that the defendant maintained the roof in a position dangerous to the intestate after notice that it was dangerous. *Warner v. Erie R. Co.*, 39 N. Y. 470; Redf. on Railways, § 181, note 2. Defendant was only responsible for latent defects and such as could not be guarded against by the exercise of proper care. *De Graff v. N. Y. C. R. R. Co.*, 1 T. & C. 255; *Owen v. N. Y. C. R. R. Co.*, 1 Lans. 108; *Greenleaf v. Ill. C. R. R. Co.*, 4 Am. Rep. 181; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Dougan v. Champ. Tr. Co.*, 56 id. 1; *Warner v. Erie R. Co.*, 39 id. 468. Plaintiff must be held to have assumed all the risks which grew out of, or were incident to, or connected with his employment. *Cruty v. Erie R. Co.*, 3 T. & C. 247; *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 612. The accident was caused by the contributory negligence of the intestate. *Dougan v. Champ. Tr. Co.*, 56 N. Y. 1.

John H. Martindale, for respondent. The defendant was chargeable with negligence toward the intestate by maintaining the roof by which he was killed. 4 Wall. 189, 196; 8 Allen, 444-446; 10 Mass. 261; *Ryan v. Fowler*, 24 N. Y. 413-415; 49 id. 532; 58 id. 449; 52 Ill. 188.

ALLEN, J. When the deceased entered the employment of the defendant he assumed the usual risks and perils of the service, and also the risks and perils incident to the use of the machinery and property of the defendant as it then was, so far as such risks were apparent. Accepting service with a knowledge of the character and position of the structures from which the employees might be liable to receive injury, he could not call upon the defendant to make alterations to secure greater safety, or in case of injury from risks which were apparent, he could not call upon his employer for indemnity. Lord Chief Justice Cockburn, in *Clarke v. Holmes*, 7 H. & N. 937, says: "No doubt, when a servant enters on an employment, from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or if he thinks proper to accept an employment on machinery defective from its construction or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the

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contracting parties contemplated as incidental to the employment." It is not necessary to hold that this rule should be applied in all its rigor to casualties arising from the use of complex and dangerous machinery, the condition of which, or the risks involved in different conditions of it, an ordinary workman might be incapable of judging. But here the structure was permanent in its character, and the risks resulting from its location were as apparent to the ordinary laborer as to a skilled mechanic or expert. They were visible to all, and could be as well appreciated by the deceased, who had for many years resided at the place of the injury, as by the officers and agents of the company. He took service subject to all risks incident to the position and mode of construction of the station-house; and if the defendant did nothing after the employment to aggravate the danger, there was no liability. The evidence does not show that there was any change in the building or in the road after the deceased entered the service of the defendant. *Seymour v. Maddox*, 16 Ad. & El. 327. It is said by ELLSWORTH, J., in *Hayden v. Smithville Manuf. Co.*, 29 Conn. 548, that "every manufacturer has the right to choose the machinery to be used in his business in the manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances and run his mill with old or new machinery, just as he may ride in an old or new carriage, or navigate an old or new vessel. The employee, having knowledge of the circumstances and entering service for the stipulated reward, cannot complain of the peculiar tastes and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service."

Again, if the defects in the machinery or other appliances are as well known to the servant as to the master, the servant must be regarded as voluntarily incurring the risk resulting from its use, unless the master, by urging on the servant or coercing him into danger, or in some other way, directly contributes to the injury. *Assop v. Yates*, 2 H. & N. 768; *Priestley v. Fowler*, 3 M. & W. 1; *Williams v. Clough*, 3 H. & N. 258; *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521; S. C., 10 Am. Rep. 417, per FOLGER, J.

The intestate, as brakeman and conductor, had been familiar with this part of the road for a very long time, having passed over it daily for several months, and had been a resident of Attica, familiar with all the surroundings of the station for many years; the peculiar construction of the roof of the station-house, the size and width of the cars and the near approach of the roof to the passing cars was as patent to the deceased as to the defendant, or any of its officers or agents.

These considerations would lead to a reversal of the judgment

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and a new trial ; but there are other difficulties in the way of maintaining the action. It is conceded that if the servant is himself guilty of negligence contributing to the injury, he cannot recover of the master, although the latter has been derelict in his duty to provide suitable appliances for the particular service. The deceased, of his own volition and without any necessity connected with his duties as conductor of the train, so far as the evidence discloses, undertook to climb the cars when under way, and just at the point of danger, and, so far as appears, at the only point of especial risk. This he did at his peril. He did not incur the peril at the request of the defendant or its officers or agents, or in pursuance of any general or special orders of the company. He had time and might have gotten up before the train moved if there was occasion for his being on the car rather than in the "caboose," which was his usual place for riding between stations. If there was not time he could have secured it, as he had control of the movements of the train. There was no evidence that he had climbed up to give directions to the head brakeman ; and if that was the object it was only necessary because of his neglect to give the proper directions while the train was at rest. It is evident that this was not the occasion, as the brakeman was on the car immediately in the rear of that on which the deceased was climbing, and asked and received the necessary information as the deceased was getting up ; and the latter continued on his way and was injured after that.

The judgment must be reversed and a new trial granted, costs to abide the event.

All concur ; except ANDREWS, J., not voting, and MILLER, J., dissenting ; FOLGER, J., concurs in result, on the ground that plaintiff's intestate had, at the time of the accident, no call of duty upon the top of the car, and there was no evidence warranting the submission of that question to the jury.

Judgment reversed.

RODERIGAS v. THE EAST RIVER SAVING INSTITUTION, appellant.

(63 N. Y. 460.)

Payment to the administrator of a living person. Surrogates' Courts.

A payment by a debtor to an administrator duly appointed is valid, and a bar to an action to compel a second payment, although the supposed intestate is alive at the time and the letters of administration are subsequently revoked for this reason. Although Surrogates' courts are of limited and special jurisdiction, which depends

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upon the existence of certain facts, yet their decision upon the existence of such facts and their consequent jurisdiction is conclusive until regularly reversed or vacated, and will protect all innocent parties acting on the faith of it.

ACTION by an administratrix to recover a deposit made in defendants' bank by James Devine, plaintiff's intestate. The opinion states the case. A judgment for the plaintiff was entered on a trial by the court and was affirmed by the General Term of the Superior Court of New York.

S. P. Nash, for appellant. The administratrix was authorized to demand the deposit of defendant, and her receipt was a valid discharge. 2 R. S. 74 (m. p.), § 26; *id.* 80, § 57; *id.* 79, § 47; *id.* 78, § 46; *Wms. on Exrs.* 492; *Prosser v. Wagner*, 1 C. B. (N. S.) 289; *Belden v. Meeker*, 47 N. Y. 302; *Rogers v. Rogers*, 3 Paige, 379; 1 *Laws of* 1870, p. 826; *Porter v. Purdy*, 29 N. Y. 106, 110; *Roborg v. Hammond*, 2 H. & G. 42; *Bolton v. Jacks*, 6 Robt. 166; 1 *Wms. on Exrs.* (Am. ed. 1859) 476; *Noel v. Wells*, 1 Lev. 235; 1 Sid. 359; 2 Kel. 337; *Allen v. Dundas*, 3 T. R. 125; *Sheldon v. Wright*, 5 N. Y. 497, 511. The granting of administration upon the estate of a person supposed to be dead is not a taking of his property without due process of law. *Oppenheim v. De Wolf*, 3 Sandf. Ch. 570; 1 R. S. 749, § 6; 2 *id.* 139, § 6; *Cropsey v. McKinney*, 30 Barb. 47. The administration of estates is of the nature of proceedings *in rem*. *Broderick's Will*, 21 Wall. 503, 509. The surrogate had jurisdiction, and if he decided amiss as to the evidence, his decision was erroneous, but it was not void. *Miller v. Brinkerhoff*, 4 Den. 119; *Staples v. Fairchild*, 3 Comst. 41; *Skinnion v. Kelly*, 18 N. Y. 355; *Webber v. Shearman*, 6 Hill, 20, 29; 30; *Nat. Bk. of Chemung v. City of Elmira*, 53 N. Y. 49; *Dorwin v. Strickland*, 57 *id.* 492; *Bell v. Pierce*, 51 *id.* 12. Proof of residence, or locality of assets, or of death, properly presented, confers jurisdiction in the first instance, though the proof may turn out to be false, and the decision is conclusive in favor of innocent third parties. 2 R. S. 221, § 6; *id.* 74, § 26; 1 R. L. 445, § 5; *People v. Tracy*, 1 Den. 617; 1 Swab. & T. 6, 7, 11, 53; *Bumstead v. Read*, 31 Barb. 661; *Bolton v. Brewster*, 32 *id.* 389; *Monell v. Dennison*, 8 Abb. 401; *Malcomb v. Phelps*, 16 Conn. 127; *Roborg v. Hammond*, 2 H. & G. 42; 31 Barb. 669; *Caujolle v. Ferrie*, 18 Wall. 465.

S. Jones, for respondent. At common law, administration granted upon the estate of a person in life was wholly void, although granted by a court having full power and jurisdiction. *Allen v. Dundas*, 3 T. R.

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125; *Griffith v. Frazier*, 8 Cranch, 9; *Jochumsen v. Suf. Sogs. Bk.*, 3 Allen, 87. Death must have occurred in fact, before a surrogate has jurisdiction to grant either letters testamentary or of administration. Laws 1813, chap. 79, §§ 3, 5, p. 445; Laws 1837, chap. 460, p. 524; 1 Kent's Com. (5th ed.) 464. Section 47 of 2 Revised Statutes, p. 79, is simply declaratory, and does not protect sales made or acts done by administrators appointed over the estate of a living person. *Prosser v. Wagner*, 1 C. B. (N. S.) 289; *Sheldon v. Wright*, 5 N. Y. 497. Chapter 359, Laws of 1870, p. 826, has not a retrospective effect. Sedgw. on Stat. and Const. Law (ed. 1867), 202. It is not in the power of the Legislature or court to confer jurisdiction on a surrogate over the estate of living persons. 2 Kent's Com. (12th ed.) 319, 326, 386, 409; *Bloom v. Burdick*, 1 Hill, 139. It was proper to set up the want of jurisdiction in the surrogate. *Bolton v. Jacks*, 7 N. Y. Sup. 193-203; *Barton v. Winslow*, 12 Wend. 102; *Hurd v. Shipman*, 6 Barb. 625. The Surrogate's Court is a court of peculiar, special and limited jurisdiction. *People v. Corlies*, 1 Sand. 228; *People v. Barnes*, 12 Wend. 492; *In re Watson*, 3 Lans. 408; *Corwin v. Merritt*, 3 Barb. 341; 2 R. S., pt. 3, chap. 3, tit. 2, art. 1, § 1; *Paff v. Kinney*, 1 Brad. 1; Stat. at Large, 179, 229, 286. The surrogate had no jurisdiction over the subject-matter. 2 R. S. pt. 2, chap. 6.

EARL, J. On the 1st day of October, 1857, the intestate, James Devine, deposited with the defendant, a savings bank in the city of New York, the sum of \$485, and soon thereafter went to the Island of Cuba with his wife, the present plaintiff, to reside, leaving his wife's mother, Isabella McNeil, residing in the city of New York. Neither James Devine nor his wife having returned to New York in April, 1869, Mrs. McNeil applied to the surrogate of New York for letters of administration upon his estate, upon sufficient formal proof that he had died intestate, leaving assets in the county of New York, and that his wife was also dead, and that she was a creditor; and in May, 1869, the surrogate granted letters of administration to Mrs. McNeil upon his estate. The proceedings resulting in the letters of administration complied with the statutes upon the subject, and were all regular in form. After letters were issued to her she went to the savings bank, produced her letters and demanded and received the deposit, which had been made about twelve years before, with the accumulation of interest.

In May, 1872, the plaintiff returned from Cuba to New York, and then for the first time learned what her mother had done, and she applied to the surrogate for letters of administration upon her husband's estate

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upon allegations and proofs that he lived in Cuba until March, 1871, when he died intestate, and the surrogate revoked the letters which had been issued to Mrs. McNeil and granted letters to the plaintiff, who had again married.

The plaintiff then demanded the deposit of the defendant, with the accumulation of interest, and payment being refused she brought this action and recovered. The sole question for our consideration is, whether the payment to the first administratrix is a defense to this action.

It is claimed, on the part of the plaintiff, that the surrogate, in granting letters upon the estate of her husband, who was not then dead, acted wholly without jurisdiction, and that his proceedings in granting such letters were null and void. The question as to the effect of letters granted under such circumstances, so far as I can discover, has never been decided in this State, and is, in this case, for the first time before this court for consideration.

Surrogate's Courts are courts of limited and special jurisdiction, and yet their jurisdiction to grant administration upon the estates of deceased persons is general and exclusive. No other courts can act and discharge the same functions. Before their proceedings can have any validity or confer any authority, they must have jurisdiction to act, and this is true of all courts. No court, no matter how general its jurisdiction may be, which proceeds without jurisdiction in the particular case, can make a valid record, or confer any rights.

When a statute prescribes that some fact must exist before jurisdiction can attach in any court, such fact must exist before there can be jurisdiction, and the court cannot acquire jurisdiction by erroneously deciding that the fact exists, and that it has jurisdiction. But where general jurisdiction is given to a court over any subject, and that jurisdiction depends, in the particular case, upon facts which must be brought before the court for its determination upon evidence, and where it is required to act upon such evidence, its decision upon the question of its jurisdiction is conclusive until reversed, revoked or vacated, so far as to protect its officers and all other innocent persons who act upon the faith of it. *Miller v. Brinkerhoff*, 4 Denio, 119; *Staples v. Fairchild*, 3 N. Y. 41; *People v. Sturtevant*, 9 id. 263; *Skinion v. Kelley*, 18 id. 356; *Porter v. Purdy*, 29 id. 106; *Bumstead v. Read*, 31 Barb. 661; *Grignon's Lessees v. Astor*, 2 How. (U. S.) 319; *Holcomb v. Phelps*, 16 Conn. 127; *State v. Scott*, 1 Baily (Law R.), 294; *Roborg v. Hammond*, 2 H. & G. 42; *Brittain v. Kinnaird*, 1 Brod. & Bing. 432.

This rule as to the jurisdiction of officers and courts of limited and special jurisdiction has many illustrations in the cases cited. In *Staples*

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v. *Fairchild*, the rule is announced as follows: "Where certain facts are to be proved before a court or officer of special and limited jurisdiction as a ground for issuing process, and there is a *total* defect of evidence, the process will be void; but where the proof has a legal tendency to make out a proper case, in all its parts, for the jurisdiction of the court or officer, although such proof may be slight and inconclusive, the process will be valid until set aside on a direct proceeding for that purpose. In one case the court acts without authority, in the other it only errs in judgment upon a question properly before it for adjudication. In the one case there is a defect of jurisdiction; in the other there is only error of judgment." In *Porter v. Purdy*, the following language is used: "When, in special proceedings in courts or before officers of limited jurisdiction, they are required to ascertain a particular fact, or to appoint persons to act in such proceedings, having particular qualifications or occupying some peculiar relations to the parties or the subject; such acts, when done, are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose; and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be." In *Grignon's Lessee v. Astor*, where, by a law of Michigan, the County Courts have power, under certain circumstances, to order the sale of the real estate of a deceased person for the payment of debts and legacies, it was held that it was for that court to decide upon the existence of the facts which gave jurisdiction. In *Brittain v. Kinnaird*, DALLAS, Ch. J., said: "The magistrate, it is urged, could not give himself jurisdiction by finding that to be a fact which did not exist, and he was bound to inquire as to the fact, and when he has inquired his conviction is conclusive of it."

The jurisdiction of Surrogates' Courts is defined, and their proceedings are regulated in our statutes. It is provided (2 R. S. 74, § 23) that "the surrogate of each county shall have exclusive power, within the county for which he may be appointed, to grant letters of administration of the goods, chattels and credits of persons dying intestate in the following cases: 1. When an intestate, at, or immediately previous to his death, was an inhabitant of the county of such surrogate, in whatever place such death may have happened. 2. When an intestate, not being an inhabitant of this State, shall die in the county of such surrogate, leaving assets therein. 3. When an intestate, not being an inhabitant of this State, shall die out of the State, leaving assets in the county of such surrogate and in no other county. 4. When an intestate, not being an inhabitant of this State, shall die out of the State, not leaving assets therein, but assets of such intestate shall thereafter come into the county of such surrogate."

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It is further provided (§ 26) that "before any letters of administration shall be granted on the estate of any person who shall have died intestate, the fact of such person's dying intestate shall be proved to the satisfaction of the surrogate, who shall examine the persons applying for such letters, on oath, touching the time, place and manner of the death, and whether or not the party dying left any will; and he may also, in like manner, examine any other person, and may compel such person to attend as a witness for that purpose."

Under these provisions of the statute, the surrogate can no more institute a proceeding than the judge of any other court can institute a suit. He must wait until some person interested comes before him and, upon proper allegations, invokes the exercise of his jurisdiction; and then he has not the option to exercise it — he must exercise it. If he should refuse to act, he can be compelled to action by mandamus. While the statute gives him no jurisdiction to administer upon the estate of a living person, it imposes upon him the duty of inquiry as to the death of any person upon whose estate letters of administration are applied for, and the inquiry is a judicial inquiry. In discharging that duty, he may examine the person applying for letters and examine other witnesses, and in making such examination he is discharging his judicial functions and exercising his rightful jurisdiction. He can compel the attendance of witnesses before him by attachment; and false swearing would be perjury under our statutes upon that subject. When proof has been produced to his satisfaction, the other conditions of the statute being complied with, he must issue letters. The inquiry may be a difficult one. In many cases in the time of war, in the cases of absence upon the seas, or in foreign lands, and in the case of long absence unheard from, death cannot be proved with infallible certainty. Witnesses may be untruthful or mistaken, and the surrogate may thus be led into error, yet he must act; the statute makes it his duty to do so. He must decide upon the fact of death as best he can upon the evidence produced, exercising a judgment not infallible. Does he decide it at his peril? If he decides one way, has he jurisdiction? And if he decides the other, has he no jurisdiction and has he had none?

The claim is, that if death has not occurred, although the surrogate may have been satisfied by the clearest proof before him that death had occurred, his proceedings are a nullity for want of any jurisdiction to act. The consequence is that they furnish no protection to any one. The surrogate, who has in good faith ordered the sale of property and the distribution of money, may, in after years, be made liable for the whole estate. After many years it may be a question whether the in-

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testate died in one month or in another month, earlier or later; and shall the jurisdiction of the surrogate and the validity of his proceedings and his protection against liability depend upon how this question may be determined by a jury upon disputed evidence? If the surrogate's proceedings are to be held null and void in case he errs as to the fact of death, the same result must follow if he errs as to the place of death, and as to the other facts mentioned in section 28, above cited. The fact of inhabitancy is frequently one difficult to be determined. It is one the surrogate must determine before he can issue letters, and its determination frequently depends upon disputed and fallible evidence; and if error as to the fact of death will leave him with no jurisdiction, so will error as to the fact of inhabitancy, and the consequence will be that in such a case his proceedings will give no protection to any one. A construction of the statutes which will lead to such results will make the laws as to the jurisdiction and proceedings of Surrogates' Courts difficult and hazardous to execute, and should not be tolerated unless the language used will admit of no other construction. I am of opinion, taking into consideration the various provisions of the statutes, that it was the intention of the legislature to confer upon Surrogates' Courts sole and exclusive jurisdiction over the subject of granting letters of administration; and as part of that jurisdiction to determine the facts, upon sufficient evidence, upon which their action must rest.

As early as 1792 (2 Greenl. 420), in the preamble to an act concerning administrators, it is recited that "administrations had been frequently granted in this State, upon the mere suggestion of the party applying for the same, without due proof of the death of the person upon whose estate they were granted; and it has happened that administrations had been granted upon estates of persons who were then living and residing within this State; and administrations were frequently granted to persons in no wise related to the intestate, and who procured administration only with a view of appropriating the estate of the intestate to their own use, from which practice great inconveniences were likely to ensue," for remedy whereof it was enacted "that no letters of administration should thereafter be granted by the judge of probates or by any surrogate upon the estate, goods, chattels or credits of any person represented as having died intestate until due proof be made before the said judge or surrogate to his satisfaction that such person was dead and died intestate;" and substantially the same provision has been continued in the statutes to this day. This provision has made it the duty of the surrogate to institute a judicial inquiry into the facts of death and intestacy.

The statutes furnish a complete system. The surrogate is to take

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judicial action and determine the facts upon which his jurisdiction rests. If the case be a proper one he must issue letters, and then the letters are conclusive evidence of the authority of the administrator until reversed on appeal or revoked. 2 R. S. 80, § 56. There is ample power to revoke or vacate letters in case they have been improperly granted; but in that case the acts of the administrator, done in good faith, are valid. 2 R. S. 80, § 47; Laws of 1837, ch. 460; *Flinn v. Chase*, 4 Denio, 85; *Kerr v. Kerr*, 41 N. Y. 272. The administrator is required to give a bond that he will faithfully execute his trust and obey all orders of the surrogate touching the administration.

Taking all these provisions together it is apparent that it would be rare that a living person would be seriously harmed by administration upon his estate. But it is otherwise with persons who deal with those who are thus clothed as administrators with the conclusive evidence of authority. This defendant, when called upon by the first administrator, could not resist payment, even if it had been practicable for it to ascertain that Devine was then living; and whether he was dead or alive was an issue which it would not have been permitted to litigate. *Prosser v. Wagner*, 87 Eng. Com. Law, 287, and note; *Belden v. Meeker*, 47 N. Y. 307; *Parhan v. Moran*, 4 Hun, 717; *Williams on Executors*, 492.

As my conclusion in this case is based upon the construction of the statutes of this State regulating the jurisdiction and proceedings of Surrogates' Courts, decisions from other States made under statutes not the same, can furnish us little aid; but the following authorities tend somewhat to sustain the conclusion I have reached. *Bumstead v. Read*, 31 Barb. 661; *Bolton v. Brewster*, 32 id. 389; *Morrell v. Dennison*, 8 Abb. 401; *Holcomb v. Phelps*, 16 Conn. 127; *Roborg v. Hammond*, 2 Harr. & Gill, 42; *Parhan v. Moran*, *supra*.

There is a dictum adverse to my conclusion in *Allen v. Dundas*, 3 T. R. 125; and also in *Griffith v. Frasier*, 8 Cranch, 9. In *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87, the precise question involved in this case, of the payment by the savings bank to an administrator of a depositor appointed in his life-time, was decided under the Massachusetts statutes adversely to the views I have expressed. It was held that the depositor could recover notwithstanding the prior payment by the bank to the administrator. In *Bolton v. Jacks*, 6 Robt. Supr. 166, there is a learned discussion of the question of the jurisdiction of courts, and it was there held that if a surrogate admitted to probate a will of a testator not at the time of his death an inhabitant of his county, he acted without jurisdiction, and that his proceeding was void and could be attacked collaterally. I believe the decision to be unsound in this respect.

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A further criticism of cases to which our attention has been called would not be useful. The question for our decision is not free from doubt; a decision either way would be confronted with some authority and meet with some logical difficulties.

The judgment must be reversed and a new trial granted, costs to abide event.

MILLER, J. The question to be determined in this case is, whether payment to an administrator, duly appointed by the surrogate as the law directs, of a person supposed to be dead, and who it subsequently appears was living at the time when letters were granted, is valid and conclusive against an administrator actually appointed after the decease of the intestate.

The right to letters of administration upon the estate of a deceased person is regulated by statute, and it is provided that "before any letters of administration shall be granted on the estate of any person who shall have died intestate the fact of such persons dying intestate shall *be proved to the satisfaction of the surrogate who shall examine the persons applying for such letters* on oath touching the *time, place and manner of the death*, and whether or not the *party dying left any will*, and he may also, in like manner, examine any other person, and may compel such person to attend as a witness for that purpose." 2 R. S. 74, § 26. The first part of the section cited makes provision for proof of death and intestacy in all cases to the satisfaction of the surrogate, and the latter portion for an examination as to the death, circumstances connected therewith, and as to the fact whether the party dying left a will. The foundation upon which the proceedings rest are death and intestacy, and both of these must be satisfactorily established. Sufficient evidence must be furnished to afford a reasonable presumption and to satisfy the officer of these essential facts. When this is done according to the rules applicable to such cases, the surrogate is legally bound to grant the letters applied for. He is obligated to perform this duty, which is judicial in its character, and carries with it the sanction of lawful authority. Such an application is a trial by the officer named of the fact of the death and intestacy of the person whose estate is sought to be administered upon. It is only to be made upon notice to the heirs at law and next of kin, or to such parties as the law directs; but when the proof is furnished as the law requires, the surrogate would not be authorized to disregard the evidence and deny the application. He has no alternative but to issue the letters demanded, and upon refusal to do so, his decision would be the subject of review in an appellate tribunal and, if adverse to the plain proof, liable to reversal.

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The statute also provides that letters "granted by any officer having jurisdiction shall be conclusive evidence of the authority of the persons to whom the same may be granted, until the same shall be reversed on appeal or revoked, as in this chapter provided." 2 R. S. 80, § 56. A subsequent provision declares that all sales made in good faith and all lawful acts done by administrators before notice of a will, or by executors or administrators who may be removed or superseded, etc., shall remain valid, and shall not be impeached by any subsequent revocation or superseding of the authority, etc. 2 R. S. 79, § 47. The effect of these last provisions must depend upon the construction to be given to the section first cited as to the jurisdiction thereby acquired. They were evidently incorporated into the statute as part of an entire system, and may properly be considered together. The power and the duty of the surrogate to issue the letters upon satisfactory proof being furnished, is very clear, and the point to be determined is, whether he had no jurisdiction because it subsequently turned out that the alleged intestate was living. It is, no doubt, true that the surrogate has no jurisdiction to grant letters upon the estate of a living person; but a mode has been provided by law to test the fact whether a person is deceased, and as the legislature has enacted how this shall be done, and as the adjudication of a competent tribunal must stand when jurisdiction is acquired until reversed or superseded, as the law requires, it is not apparent that such a determination is invalid and without jurisdiction. If the statute (§ 24, *supra*) had provided only for the issuing of letters, and not proceeded to state what proof was required, it might well be argued that no jurisdiction was acquired. So, if the surrogate had issued the letters without the requisite proof, the same result would follow. As, however, it does declare what proof must be given, it is difficult to determine how its effect can be avoided, because it afterward is made to appear that there was a mistake, or that the evidence was false and untrue. While this may furnish sufficient ground for issuing new letters superseding those first issued, it cannot render all which has been done under the first void and of no effect.

The legislature has conferred upon the surrogate of each county in the State sole and exclusive jurisdiction within the county to grant letters of administration of the personal estate of persons dying intestate. It has given authority and provided what proof shall be given upon an application for letters, and that the surrogate shall be satisfied before he grants the same. The power of the legislature to enact laws in reference to the administration of the estates of deceased persons cannot be doubted. And as incident to that power, it is entirely competent to

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authorize the tribunal constituted for such a purpose to pass upon the question of fact and determine, what is often difficult to ascertain, whether the person whose estate is the subject of the application is living or dead. It must be determined by some tribunal before letters can be granted, and no satisfactory reason is given why the legislature should not declare by statutory enactment the mode in which it shall be done and the effect of such a determination. Cases arise where death takes place under circumstances where no living witness can be produced to testify to the fact. Parties disappear suddenly, with no trace of their whereabouts. They are sometimes lost, or supposed to be lost, at sea, or are so long absent from their homes and from communication with relatives and friends as to raise a presumption that death has taken them away. If the doctrine can be upheld that in such cases there is no power to confer jurisdiction to decide the question as to the death of such persons, then there would be no method existing to dispose absolutely of estates among those who are entitled to the same after death has been judicially determined. And even after the avails are distributed among creditors by virtue of a judgment of a competent court, and payment of debts made by a legally authorized representative, the parties receiving the same may be compelled to refund, discharges of liens on real estate set aside to the detriment of innocent parties, the title to real estate sold by order of the surrogate vacated, and the most inextricable confusion ensue. It cannot well be claimed that the legislature has not the power to provide safeguards for the protection of innocent third parties who act under the decree of a competent court, and thus remedy the evils which would flow from a want of such power. Enactments to guard against such consequences cannot be regarded as divesting a person of his property, or interfering with rights, without due process of law, in violation of a constitutional right. At most, such laws are but regulations in regard to a subject of general interest to the entire community, and are essential for the welfare of society, the promotion of justice, and the proper administration of estates. In the case at bar it was no fault of the defendants that they paid the demand to an administrator duly qualified, and the blame, if any, rests with the party who, by a long absence, placed himself in a position where he was supposed to be dead. At common law, absentees not heard from within seven years are presumed to be dead.

The power of the legislature to pass laws providing for the vesting of estates in certain cases, upon the presumption of death, has been exercised for a long period of time, and never questioned. 1 R. S. 749, § 6. Nor has it ever been doubted that a second marriage may be made valid

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by statute after an absence for a sufficient period of time. 2 id. 139, § 6; *Cropsey v. McKinney*, 30 Barb. 47. The statutes cited affect important rights, and if such cases can be provided for, then no valid reason exists why laws may not be enacted which will authorize the granting of administration upon the estates of persons proved to be dead, and whose voluntary absence has led to that conclusion. While a person is thus absent, creditors may attach his property, the State may dispose of his real estate by a sale for taxes, and the local authority of a municipality by an assessment sale. Administration does not go as far as this, but simply changes the condition of his personal estate upon the proper security being given. The property is not confiscated, lost or misappropriated, but merely placed in the hands of a proper person to dispose of it as the law directs. True, the security taken may become irresponsible, but this may happen in case of actual death, and hence is no argument against the power of an administrator appointed by a competent tribunal.

The letters were ample authority to receive the money and justify the payment; and had the defendant refused to pay, no defense could successfully be interposed to a suit brought. The decision of the surrogate, with sufficient evidence to establish death, was a judicial determination, and is a protection to all persons acting in good faith by virtue of the letters issued by him. In *Porter v. Purdy*, 29 N. Y. 106, it was held, that the proceedings in courts, or before officers of limited jurisdiction, in regard to a particular fact, and which are in the nature of adjudications, if erroneous, must be corrected by a direct proceeding for that purpose, and if not corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be. This doctrine was applied to freeholders appointed to assess the expense of a sewer, and may be especially invoked in a case where a competent tribunal has acted judicially in reference to a subject by virtue of authority expressly conferred by law. See, also, 2 Harr. & Gill, 42; *Noell v. Wells*, 1 Lev. 235. In *Allan v. Dundas*, 3 T. R. 125, it was held that payment of money to an executor under a forged will was valid, although the probate was afterward declared null, and administration granted. Some remarks are made to the effect that the ecclesiastical court has no jurisdiction during the life of a party. This doctrine, however, has no application to cases for which provision is made by a statutory enactment. *Sheldon v. Wright*, 1 Seld. 497, is also relied upon by the plaintiff's counsel. It was an action of ejectment where title was acquired by virtue of proceedings in a Surrogate's Court. Some remarks are made in the opinion to the effect that the provisions of the Revised Laws of 1813, which differed considerably from the Revised Statutes in reference to Surrogates' Courts, are

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directory; but the distinct question now raised was not presented, and therefore it cannot be considered as authoritative and controlling. *Bolton v. Jacks*, 6 Robt. 166, involved the question as to the regularity of the probate of a will before a surrogate in a different county from that in which the testator died. The same question arose in *Merrill v. Dennison*, 8 Abb. 401; *Bolton v. Brush*, id. 389, in each of which cases the decision was in conflict with *Bolton v. Jacks*.

In *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87, the question now raised was distinctly presented upon facts almost precisely similar to the case now considered, and it was held that payment to the administrator of the living man was no defense to the suit brought by him. There was no statute in the State of Massachusetts making special provision in regard to the subject as there is here, and therefore it has no application. In reference to this case as well as other cases which uphold the same doctrine, it may also be remarked that they were disposed of without regard to any statutory regulation which conferred upon a tribunal organized for that purpose, within the jurisdiction where they were decided, authority to investigate, pass upon and decide the question, whether a person whose estate was sought to be administered upon was deceased. Such was the object and purpose of the statutes cited, and independent of any rule which may have otherwise prevailed where no tribunal was vested with power to determine the question of death, they must be regarded as conclusive.

The judgment rendered must be reversed and a new trial granted, with costs to abide the event.

For reversal, RAPALLO, ANDREWS, MILLER, and EARL, JJ.

For affirmance, CHURCH, Ch. J., ALLEN and FOLGER, JJ.

Judgment reversed.

CAMPBELL V. SEAMAN, appellant.

(63 N. Y. 568.)

Nuisance — brickburning — prescription.

Plaintiff's lands surrounding his residence, were planted with ornamental shade and fruit trees and shrubbery. On adjoining land, the defendant owned and operated a brick-kiln, wherein he manufactured brick by the use of anthracite coal, thereby producing a noxious vapor, which the wind carried upon plaintiff's lands, and which injured and destroyed his trees and shrubbery. Defendant's premises had been in use as a brick-yard though not uninterruptedly, since before the plaintiff purchased his lands and for more than twenty-five years. *Held*, (1) that the

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plaintiff was entitled to an injunction to restrain the defendant from using such coal as would produce the noxious vapor ; (2) that plaintiff was entitled to damages ; (3) that the plaintiff's right was not affected by the fact of the prior occupation by defendant, and (4) that defendant had not acquired a prescriptive right, as the kiln had not been used uninterruptedly for twenty years. (*See note, p. 580.*)

ACTION to recover damages resulting from an alleged nuisance, and to restrain the same. The case is substantially presented in the facts found by the referee which are as follows: "The plaintiffs are the owners of thirty to forty acres of land adjoining the village of Castleton, upon the Hudson river, about six miles below the city of Albany ; there are native yellow and white pines upon the said land which grew in the forest, many of the most comely of which have been saved by the plaintiffs as a protection against winds and as an ornament to the grounds. The plaintiffs have caused many of the forest trees to be removed, and have greatly ornamented and improved the said grounds by making gravel roads and walks through the same, and by planting Norway spruce and other ornamental and shade trees, and have erected an elegant dwelling-house upon the said premises, with barns and other out-houses, and therein have laid out large sums of money, and have made thereon a fine garden for grapes, plums, etc. ; that said grounds have been graded, terraced, and have been rendered very valuable by the moneys expended thereon by these plaintiffs.

That defendant, whose lands adjoin the said lands of the said plaintiffs, has for two years or more been manufacturing brick upon his own land and adjoining the plaintiffs' said lands ; that in the manufacture of such brick he mixes anthracite coal dust with the clay and sand in moulding his brick, and in constructing his kiln a portion of the brick are left out and the space filled with the anthracite coal dust ; this is done in the outer portions of the kiln, and the object obtained is : this coal dust, when the kiln becomes heated, takes fire and gives sufficient heat to burn the brick to the outer layers. The burning of the kiln under this process causes a sulphurous acid gas, for at least the last two days of the burning, to escape from the kiln, which is very poisonous and injurious to persons who inhale it, and is very destructive to many kinds of vegetation.

The evidence in the case shows that this gas from the defendant's kiln has on several occasions killed the foliage on the plaintiffs' white and yellow pines, their Norway spruce ; and has, after repeated attacks, killed and destroyed from 100 to 150 of their valuable pine and Norway spruce trees, and has injured their grape vines and plum trees. The evidence is very conclusive as to the destructive qualities of this sulphurous acid gas to the pine and Norway spruce trees, and to grape

vines and plum trees. The plaintiffs have already suffered considerable damage from the defendant burning brick at his kiln, and if continued they must inevitably continue to suffer and their property be greatly depreciated in value."

The referee also found that, "on the premises of the defendant where he has and does manufacture brick, as mentioned in the pleadings and evidence in this cause, the same have been known and used as a brick-yard for over twenty-five years; and at the time the plaintiffs improved and beautified their property they knew that the property of the defendant had been previously applied to such use, and that in such use and manufacture of brick anthracite coal and coal dust was used and employed. Near to the premises of the plaintiffs one Philip H. Smith has a brick-yard, and has employed the same in the manufacture of brick by the use of anthracite coal in the same manner as the defendant has done for the period of five years; and the Hudson River Railroad Company, whose road runs in front of the plaintiffs' premises, and near to their fruit and ornamental trees, have on the average, for more than four years past, run on said road and by said premises of the plaintiffs, daily, at least twenty-seven trains of cars propelled by locomotives burning and using the same description of coal as the defendant. That the burning of brick on the premises of the defendant by the use of anthracite coal dust does not affect the premises of the plaintiffs injuriously except in case of a southerly wind at the time of burning; and such injuries have happened only at times, and not continually, while defendant has occupied said premises. That anthracite coal, in the manner used by the defendant, has been employed in England for more than half a century, and for nearly the same period of time in the United States, and is now generally used by all manufacturers of brick in the State of New York and elsewhere. That by the use of anthracite coal in the manufacture of brick a much larger quantity of good hard brick is produced, and at much less expense, than by burning kilns of brick exclusively with wood; and brick cannot be successfully manufactured for market by the use of wood alone and compete in market with those who use anthracite coal in the manufacture. That the prohibition of the use of coal by the defendant in the manufacture of brick upon his premises is of great damage to the defendant, and substantially destroys the value of the defendant's property as a brick-yard; that as a brick-yard, employed in the manufacture of brick by the common and ordinary process with the use of mineral coals, it is very valuable and capable of producing from 8,000,000 to 4,000,000 of brick annually at good profit to the defendant.

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The referee found, as conclusions of law, that plaintiffs were entitled to recover the damage proved to have been sustained, and to an injunction restraining defendant from burning brick at the place named by the process above described.

Geo. W. Miller and W. S. Hevenor, for appellant. An injunction could not be granted unless imminent danger of great and irreparable damage was shown. *Wason v. Sanborn*, 45 N. H. 169; *Prosser v. Randall*, 7 Port. (Ala.) 435; *Ray v. Lynes*, 10 Ala. 63; *Porter v. Wilham*, 17 Me. 292; *Jordan v. Woodward*, 38 id. 424; *Morse v. Machias W. P. Co.*, 42 id. 119; *Varney v. Pope*, 60 id. 192, 195; *Forte v. Groves*, 29 Md. 188; *Wynstanley v. Ley*, 2 Swanst. 333; *Earl of Ripon v. Hobart*, 3 Myl. & K. 169; *Middleton v. Franklin*, 3 Cal. 238; *Eastman v. Amos Man. Co.*, 47 N. H. 74; *Burnham v. Kempton*, 44 id. 88; *Bean v. Coleman*, id. 593; *Hodgman v. Richards*, 45 id. 29; 1 Daniells' Ch. 609; Ang. on W. C. 174; *Dumesnil v. Dupont*, 18 B. Mon. 800; *Hood v. N. Y. and N. H. R. R. Co.*, 23 Conn. 609; *Bolster v. Catterlind*, 10 Ind. 117; *Whittlesey v. H. and F. R. R. Co.*, 23 Conn. 421; *Grey v. O. and P. R. R. Co.*, 1 Grant's Cas. 412; 3 Cal. 238; *Hieskell v. Gross*, 7 Phil. 317; *Clark's Appeal*, 62 Penn. 450; *Jones v. Powell*, Palm. 536; *Waterman's Tres.* on P. R. 577 (note); *Irwin v. Dixon*, 9 How. (U. S.) 10; *Zabriskie v. J. C. and B. R. R. Co.*, 2 Beas. 314; *Robenson v. Pittenger*, 1 Green's Ch. 57; *Gilbert v. Showerman*, 23 Mich. 448; Hill. on Injunction (2d ed.), 306. The acts of the defendant did not amount to a public or private nuisance. Hill. on Injunction (2d ed.), 306; *Attorney-General v. Cleaver*, 18 Ves. 211; *Duke of Grafton v. Hilkiard*, id. 219; *Tichenor v. Wilson*, 4 Halst. (N. J. Ch.) 197; *Crowder v. Tinkley*, 19 Ves. 617; *Attorney-General v. Shef. Gas Co.*, 19 Eng. L. and Eq. 639; 3 DeG., McN. & G. 316; *Ellis v. State*, 7 Black, 534; *Cross' Case*, 2 C. & P. 483; *Richard's Appeal*, 57 Penn. St. 105; *Rhodes v. Dunbar*, id. 274; *Bamford v. Turnley*, 3 B. & S. 62; 113 E. C. L. 80; *Phoenix v. Com. of Em.*, 1 Abb. 474; *Grey v. O. and P. R. R. Co.*, 1 Grant, 412; *Huckenstine's Appeal*, 70 Penn. St. 102; *Gilbert v. Showerman*, 23 Mich. 448; Washb. on E. and S. (2d ed.) 592; *Barnes v. Calhoun*, 2 Ired. 201; *Bradsher v. Lee's Heirs*, 3 id. 505; *Wason v. Sanborn*, 45 N. H. 169; *Attorney-General v. Perkins*, 2 Dev. 38; *Wier's Appeal*, 24 P. F. S. 231. Plaintiffs, by acquiescence for many years, are precluded from equitable relief. Add. on Torts (Am. Students' Ed.), 99; *Williams v. Earl of Jersey*, 1 Cr. & Ph. 97; *Cooper v. Hubbuck*, 30 Beav. 160; *Cotchings v. Bassett*, 3 L. J. (Ch.) 286; *Ellis v. State*, 7 Black, 354; *Cross' Case*, 2 C. & P. 483; 2 Russ. on Crimes, 430; *Elliotson v. Futhan*, 4 B. N. C. 134; 2 Crabb's R. P.,

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§ 2464 (24 L. Lib. 701); *Gilbert v. Showerman*, 23 Mich. 448; *Attorney-General v. Shef. Gas Co.*, 3 DeG., McN. & G. 322; *Bankart v. Houghton*, 27 Beav. 431; *Heenan v. Dewar*, 18 Grant's Ch. 438; *Bankhart v. Houghton*, 2 DeG., McN. & G. 940; *Dann v. Spurrier*, 7 Ves. 235, 236; *Rochdale Can Co. v. King*, 2 Sim. (N. S.) 88; *Jones v. Powell*, Palm. 538; Stephen's Com. (17th ed.) 402; 3 Kent's Com. (m. p.) 448. The doctrine of prescription intervenes for the protection of defendant against the interposition of equitable relief, even if he should be liable upon the case for damages. *Crossley v. Lightowler*, L. R., 3 Eq. 277; *Luttrell's Case*, 4 Rep. 47; 3 Cruise on R. P. (m. p.) 532; Add. on Torts (Am. Students' ed.), 53; *Elliotson v. Feetham*, 4 B. N. C. 134; *Bliss v. Call*, 5 Sc. 404; 3 Kent's Com. 448; *Rex v. Nevilles*, Peake, 43; Washb. on F. and S. (2d ed.) 592; *Smith v. Phillips*, 8 Phila.; *Crump v. Lambert*, L. R., 3 Eq. Cas. 409. Defendant is engaged in a lawful and necessary business, necessary for trade and commerce, and should not be enjoined. Broom's Leg. Max. 84; 2 Sel. N. P. 1091; 1 M. & S. 95; *Hole v. Barlow*, 4 C. B. (N. S.) 336; *Attorney-General v. Cleaver*, 18 Ves. 211; *Duke of Grafton v. Hilliard*, id. 219; *Tichenor v. Wilson*, 4 Halst. (N. J. Ch.) 197; 83 Mass. 137; Wash. on Eas., etc., 593; 2 N. J. Ch. 208.

G. P. Jenks, for respondents.

KARL, J. The plaintiffs owned about forty acres of land, situate in the village of Castleton, on the east bank of the Hudson river, and had owned it since about 1849. During the years 1857, 1858 and 1859, they built upon it an expensive dwelling-house, and during those years, and before and since, they improved the land by grading and terracing, building roads and walks through the same, and planting trees and shrubs, both ornamental and useful.

The defendant had for some years owned adjoining lands, which he had used as a brick-yard. The brick-yard is southerly of plaintiffs' dwelling-house about 1,320 feet, and southerly of their woods about 567 feet. In burning bricks defendant had made use of anthracite coal. During the burning of a kiln sulphuric acid gas is generated, which is destructive to some kinds of trees and vines. The evidence shows and the referee found, that gas coming from defendant's kiln had, during the years 1869 and 1870, killed the foliage on plaintiffs' white and yellow pines and Norway spruce, and had, after repeated attacks, killed and destroyed from 100 to 150 valuable pine and spruce trees, and had injured their grape vines and plum trees, and he estimated plaintiffs' damages from the gas during those years at \$500.

This gas did not continually escape during the burning of a kiln, but only during the last two days, and was carried into and over plaintiff's land only when the wind was from the south.

It is a general rule that every person may exercise exclusive dominion over his own property, and subject it to such uses as will best subserve his private interests. Generally, no other person can say how he shall use or what he shall do with his property. But this general right of property has its exceptions and qualifications. *Sic utere tuo ut alienum non laedas* is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. Such a rule could not be enforced in civilized society. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. For these they are compensated by all the advantages of civilized society. If one lives in the city he must expect to suffer the dirt, smoke, noisome odors, noise and confusion incident to city life. As Lord Justice JAMES beautifully said in *Sabin v. Northbrancepeth Coal Co.*, L. R., 9 Ch. Appeals, 705: "If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship-building town which would drive the Dryads and their masters from their ancient solitudes."

But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he makes an unreasonable, unwarrantable or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor, he will be guilty of a nuisance to his neighbor. And the law will hold him responsible for the consequent damage. As to what is a reasonable use of one's own property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient.

Within the rules thus referred to, that defendant's brick burning was a nuisance to plaintiffs cannot be doubted. Numerous cases might be cited, but it will be sufficient to cite, mainly, those where the precise question was involved in reference to brick burning.

The earliest case is that of the *Duke of Grafton v. Hilliard et al.*,

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decided in 1736, not reported, but referred to in *Attorney-General v. Cleaver*, 18 Vesey, 210. Chancellor ELDON there says that the court held in that case that "the manufacture of bricks, though near the habitations of men, if carried on for the purpose of making habitations for them, is not a public nuisance." By looking at that case, as found in a note to *Walter v. Selfe*, 4 Eng. Law and Eq. 18, it will be seen that no such decision was made in that case, and that no such language was used therein. A temporary injunction had been granted in the first instance, restraining brick burning, but it was dissolved upon the defendant's showing that it would really produce no annoyance or injury to the plaintiff. In *Donald v. Humphrey*, 14 F. (Sc.) 1206, the plaintiff brought an action to restrain brick burning, and insisted that the business was *per se* a nuisance and should be restrained without proof of actual injury, but the court held that the business of burning brick was a lawful business and not *per se* a nuisance, but that the question as to whether it was a nuisance or not was one of fact to be determined by the circumstances of each case, and refused an injunction without proof that the business was so conducted as to be a nuisance to the plaintiff.

In the case of *Walter v. Selfe*, *supra*, the defendants were enjoined from burning bricks in the vicinity of the plaintiffs' premises so as to occasion damage or annoyance to the plaintiffs or injury or damage to the buildings thereon standing or shrubberies or plantation named in the bill. In *Pollock v. Lester*, 11 Hare, 266, the defendant was making preparations to burn bricks near a lunatic asylum of which plaintiff was proprietor, and plaintiff brought his bill praying an injunction to restrain the defendant, alleging in his bill that the smoke and vapor arising from the brick burning would be injurious to his patients and cause them to leave his asylum, and would also injure the trees, shrubs and plants thereon growing, and the injunction was granted. This was done, it will be seen, merely upon the apprehension of damage and before any was actually suffered. After the decision of this case, *Hole v. Barlow*, 4 C. B. (N. S.) 336, was decided. That was an action for a nuisance arising from the burning of bricks on defendant's own land near to the plaintiff's dwelling-house, and the judge at the trial told the jury that no action lies for the reasonable use of a lawful trade in a convenient and proper place, even though some one may suffer inconvenience from its being carried on, and he left two questions to the jury, first, "was the place in which the bricks were burned a proper and convenient place for the purpose;" secondly, if they thought the place was not a proper place for the purpose, then "was the nuisance such as to make the enjoyment of life and property uncomfortable." It was held that there

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was no misdirection. That case, which was in conflict with prior authorities, has since been overruled in *Beadmore v. Treadwell*, 81 Law Jour. (N. S.) 873; *Bamford v. Turnley*, 31 Law Jour. (N. S. Q. B.) 286; *Cavey v. Ledbitter*, 18 C. B. (N. S.) 470; *Banham v. Hall*, 22 Law Times (N. S.) 116; *Roberts v. Clark*, 18 id. 49; *Luscombe v. Steer*, 17 id. 229. In *Beadmore v. Treadwell*, the court granted an injunction restraining the burning of bricks within 650 yards of the plaintiff's dwelling, holding that the burning of bricks within 350 yards of the plaintiff's residence was a nuisance, although the bricks were to be used in the erection of government fortifications. Vice-Chancellor STUART says: "Upon the facts of the present case, notwithstanding the contradictory evidence, my mind is satisfied that there has been an actual and positive injury to the plaintiff; that the comfort and enjoyment of his mansion-house are injured; that the trees planted and standing and growing for ornament have been, in some cases, entirely destroyed, and in many cases injured."

In *Bamford v. Turnley*, COCKBURN, J., before whom the case was tried, followed *Hole v. Barlow*, and charged the jury that if they thought the spot was convenient and proper, and that the use by the defendant of his premises was, under the circumstances, a reasonable use of his own land, he would be entitled to a verdict. The jury found for the defendant, but upon the hearing in the Exchequer Chamber it was held that the instructions were erroneous, and that it was no answer in an action for a nuisance creating actual annoyance and discomfort in the enjoyment of neighboring property that the injury resulted from a reasonable use of the property, and that the act was done in a convenient place, nor that the same business had been carried on in the same locality for seventeen years. The doctrine of *Hole v. Barlow* was distinctly repudiated, and that case was in terms overruled.

In *Cavey v. Ledbitter*, an action for a nuisance caused by brick burning, the judge at the trial left it to the jury, in substance, to say whether the acts of the defendant rendered the plaintiff's residence substantially uncomfortable, and whether his shrubs and fruit trees had been thereby injured; and he refused to ask them whether the bricks had been burned in a convenient place, and it was held that there was no misdirection.

In *Banham v. Hall*, a bill was filed for an injunction to restrain the defendant from using a brick-kiln in such a way as to be a nuisance to the property of plaintiff, or to plaintiff and his family. There, as here, the damage and annoyance were suffered only when the wind blew from the direction of the kiln, and V. C. STEWART said "that, *prima facie* a brick-kiln built within 100 yards in front of a mansion-house would

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be a nuisance, unless the process used for burning the bricks was one of an unusual kind."

Roberts v. Clark was a bill for an injunction restraining the defendant from burning brick on his premises to the injury of plaintiff's premises, and the vice-chancellor held that brick burning carried on in the ordinary way was a nuisance to persons living within the limits affected by it, and that 240 yards was no extreme limit for the smoke and vapor to extend, and that it was such a nuisance as the court would restrain.

In *Luscomb v. Steers*, the defendant rented premises and began to burn brick within 1,442 feet of the plaintiff's house on premises adjoining. At the time when the bill was brought no actual injury had been sustained by the plaintiff, but the bill was predicated upon a prospective nuisance. The court denied an injunction upon the grounds that no actual injury having been sustained no nuisance existed; and that no evidence having been given to establish the fact of prospective nuisance, it was not a case for equitable relief. But the court said: "If the business should hereafter become a nuisance to the plaintiff, he can then apply to the court for relief and his rights will be protected."

In this country, so far as I can ascertain, the question of nuisance from brick burning has rarely been before the courts. The only case to which our attention has been called is *Huckenstine's Appeal*, 70 Penn. St. 102; S. C., 10 Am. Rep. 669. In that case AGNEW, J., says: "Brick making is a useful and necessary employment and must be pursued near to towns and cities where bricks are chiefly used. Brick burning, an essential part of the business, is not a nuisance *per se*. *Atty.-Gen. v. Cleaver*, 18 Ves. 219. It, as many useful employments do, may produce some discomfort and even some injury to those near by, but it does not follow that a chancellor would enjoin therefor." He then goes on to say that the aid of an injunction is not a matter of right, but of grace, and concludes that there were so many similar nuisances in the locality that it was not clear that this nuisance increased the discomfort from them, and that it was doubtful whether the plaintiff had suffered any material damage from the acts, and therefore held that an injunction ought not to issue and that the plaintiff should be left to his remedy at law. In the following analogous cases useful industries which produced smoke or noxious gases or vapors or odors, were declared nuisances: *Callin v. Valentine*, 9 Paige, 575; *Peck v. Elder*, 3 Sandf. Sup. Ct. 129; *Taylor v. The People*, 6 Park. Cr. 352; *Davis v. Lamberson*, 56 Barb. 480; *Hutchins v. Smith*, 63 id. 251; *Whitney v. Bartholomew*, 21 Conn. 213; *Cooper v. Randall*, 53 Ill. 524; *Rex v. White*, 1 Burr, 387; *Cook v. Forbes*, L. R., 5 Eq. Cas. 166; *Sampson v. Smith*, 8 Sim. 272; *Tipping v. S*

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Helen Smelting Co., 4 B. & L. 505; *Crump v. Lambert*, L. R., 8 Eq. Cas. 409; *Pointer v. Gill*, 2 Rolle's Abr. 140. Without further citation of authority, I think it may safely be said that no definition of nuisance can be found in any text-book or reported decision which will not embrace this case.

But the claim is made that although the brick burning in this case is a nuisance, a court of equity will not and ought not to restrain it, and the plaintiffs should be left to their remedy at law, to recover damages, and this claim must now be examined.

Prior to Lord ELDON's time, injunctions were rarely issued by courts of equity. During the many years he sat upon the woolsack this remedy was resorted to with increasing frequency, and with the development of equity jurisprudence, which has taken place since his time, it is well said that the writ of injunction has become the right arm of the court. It was formerly rarely issued in the case of a nuisance until plaintiff's right had been established at law, and the doctrine which seems now to prevail in Pennsylvania, that this writ is not a matter of right, but of grace, to a large extent prevailed. But now a suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate tribunal. It is matter of grace in no sense except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one. If improperly exercised in any case either in granting or refusing it, the error is one to be corrected upon appeal. *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191; *Reid v. Gifford*, Hopkins' Ch. 416; *Pollitt v. Long*, 58 Barb. 20; *Mohawk and Hudson R. R. Co. v. Artcher*, 6 Paige, 88; *Parker v. Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black (U. S.), 545, 551; *Webber v. Gage*, 39 N. H. 182; *Dent v. Auction Mart Association*, 35 L. J. Ch. 555; *Attorney-General v. United Kingdom Tel. Co.*, 30 Beav. 287; *Wood v. Sutcliffe*, 2 Sim. (N. S.) 165; *Clowes v. Staffordshire Potteries Co.*, L. R., 8 Ch. App. 125. Here the remedy at law was not adequate. The mischief was substantial and, within the principle laid down in the cases above cited and others to which our attention has been called, irreparable.

The plaintiffs had built a costly mansion and had laid out their grounds and planted them with ornamental and useful trees and vines, for their comfort and enjoyment. How can one be compensated in damages for the destruction of his ornamental trees and the flowers and vines which

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surrounded his home? How can the jury estimate their value in dollars and cents? The facts that trees and vines are for ornament or luxury entitles them no less to the protection of the law. Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who provides himself only with articles of necessity. The law will protect a flower or a vine as well as an oak. *Cook v. Forbes*, L. R., 5 Eq. Cas. 166; *Broadbent v. Imperial Gas Co.*, 7 De G., McN. & G. 436. These damages are irreparable too, because the trees and vines cannot be replaced, and the law will not compel a person to take money rather than the objects of beauty and utility which he places around his dwelling to gratify his taste or to promote his comfort and his health.

Here the injunction also prevents a multiplicity of suits. The injury is a recurring one, and every time the poisonous breath from defendant's brick-kiln sweeps over plaintiff's land they have a cause of action. Unless the nuisance be restrained the litigation would be interminable. The policy of the law favors, and the peace and good order of society are best promoted by the termination of such litigations by a single suit.

The fact that this nuisance is not continual, and that the injury is only occasional, furnishes no answer to the claim for an injunction. The nuisance has occurred often enough within two years to do the plaintiffs large damage. Every time a kiln is burned some injury may be expected, unless the wind should blow the poisonous gas away from plaintiffs' lands. Nuisances causing damage less frequently have been restrained. *Ross v. Butler*, 19 N. J. 294; *Meigs v. Lister*, 23 N. J. Eq. 200; *Olowes v. North Staffordshire Potteries Co.*, *supra*; *Mulligan v. Elias*, 12 Abb. Pr. (N. S.) 259.

It matters not that the brick-yard was used before plaintiffs bought their lands or built their houses. *Taylor v. The People*, *supra*; *Wier's Appeal*, 74 Penn. St. 230; *Brady v. Weeks*, 3 Barb. 156; *Barwell v. Brooks*, 1 Law Times (N. S.), 454. One cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor's land may in the future be subjected. He may make a reasonable and lawful use of his land and thus cause his neighbor some inconvenience, and probably some damage which the law would regard as *damnum absque injuria*. But he cannot place upon his land any thing which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such way only as the neighboring nuisance will allow.

It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from any equitable relief. I do not perceive how any acquiescence short of twenty years can bar one from complaining of a nuisance,

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unless his conduct has been such as to estop him. There is no proof that plaintiffs, when they bought their lands, knew that any one intended to burn any bricks upon the land now owned by defendant. From about 1840 to 1853 no bricks were burned there. Then from 1853 to 1857 bricks were burned there, and then not again until 1867. From 1857 to 1867 the brick-yard was plowed and used for agricultural purposes. Before suit brought, plaintiffs objected to the brick burning. No act or omission of theirs induced the defendant to incur large expenses or to take any action which could be the basis of an estoppel against them, and therefore there was no acquiescence or laches which should bar the plaintiffs, within any rule laid down in any reported case.

It is true that if a party sleeps on his rights and allows a nuisance to go on without remonstrance or without taking measures either by suit at law or in equity to protect his rights, and allows one to go on making large expenditures about the business which constitutes the nuisance, he will sometimes be regarded as guilty of such laches as to deprive him of equitable relief. But this is not such a case. *Radenhurst v. Coate*, 6 Grant's Ch. (Ont.) 140; *Heenan v. Dewar*, 18 id. 438; *Bankart v. Houghton*, 27 Beav. 425.

The defendant claims a prescriptive right to burn bricks upon his land and to cause the poisonous vapors to flow over plaintiffs' lands. Assuming that defendant could acquire by lapse of time and continuous user the prescriptive right which he claims, there has not here been a continuous use and exercise of the right for twenty consecutive years. Anthracite coal was first used for burning bricks in this yard in 1834, and after six years brick burning was discontinued. It was not resumed again until about 1853, and after four years it was again discontinued, and it was not resumed again until 1867. So that anthracite coal, which caused plaintiffs' damage, had not been used in all for twenty years and certainly not continuously in burning bricks upon the yard now owned by defendant. If he could acquire the right claimed by prescription, he, and those under whom he holds, must for twenty years have caused the poisonous gases to flow over plaintiffs' land whenever they burned bricks and the wind blew from the direction of the kiln. Such a prescription neither the allegations in the answer nor the proofs upon the trial, nor the findings of the referee, warrant. The referee finds that the premises of defendant have been known and used as a brick-yard for over twenty-five years. This is not a finding that they have been used as a brick-yard for twenty-five years continuously, or that they have caused the poisonous gases to flow over plaintiffs' land for that length of time continuously. *Ball v. Ray*, L. R., 8 Ch App., 467; *Parker v. Mitchell*, 11 Ad. & El.

788; *Battishill v. Reed*, 18 C. B. 696; *Bradley Fish Co. v. Dudley*, 87 Conn. 136.

Where the damage to one complaining of a nuisance is small or trifling, and the damage to the one causing the nuisance will be large in case he be restrained, the court will sometimes deny an injunction. But such is not this case; here the damage to the plaintiffs, as found by the referee, is large and substantial. It does not appear how much damage the defendant will suffer from the restraint of the injunction. He does not own the only piece of ground where bricks can be made. We know that material for brick making exists in all parts of our State, and particularly at various points along the Hudson river. An injunction need not therefore destroy defendant's business or interfere materially with the useful and necessary trade of brick making. It does not appear how valuable defendant's land is for a brick-yard, nor how expensive are his erections for brick making. I think we may infer that they are not expensive. For aught that appears, his land may be put to other use just as profitable to him. It does not appear that defendant's damage from an abatement of the nuisance will be as great as plaintiff's damages from its continuance. Hence this is not a case within any authority to which our attention has been called, where an injunction should be denied on account of the serious consequences to the defendant.

We cannot apprehend that our decision in this case can improperly embarrass those engaged in the useful trade of brick making. Similar decisions in England, where population and human habitations are more dense, do not appear to have produced any embarrassment. In this country there can be no trouble to find places where brick can be made without damage to persons living in the vicinity. It certainly cannot be necessary to make them in the heart of a village or in the midst of a thickly settled community.

Defendant complains that the damage allowed by the referee was too great. He had the evidence and all the circumstances before him, and we cannot review his decision upon the amount of damage.

It is also complained that the injunction contained in the judgment as entered is broader and more unlimited than that ordered by the referee. This is a matter not to be corrected upon appeal. Defendant should have compelled an entry of judgment in accordance with the decision of the referee. If plaintiffs entered a judgment not authorized by the referee's report, defendant should have moved to set it aside or to correct it.

One of the three judges who heard the appeal in the General Term of

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the Supreme Court died before the decision was made, and the appeal was decided by the remaining two judges, and this appeal is from the judgment entered upon that decision. It is now objected that the two judges could not make a decision. Even if the defendant, after he has appealed from the judgment, can raise the objection, we are of opinion that the objection is not well founded, and that two judges can hold a General Term and decide cases argued there. *Van Rensselaer v. Witbeck*, 2 Lans. 499.

It follows from these views that the judgment should be affirmed.

All concur.

Judgment affirmed.

NOTE.—See *Huckenstine's Appeal*, 10 Am. Rep. 669, and note; S. C., 70 Penn. St. 102; *State v. Rankin*, 16 Am. Rep. 737; S. C., 3 S. C. 438; *Slight v. Gutzlaff*, 17 Am. Rep. 476; S. C., 35 Wis. 675; *Adams v. Michael*, 17 Am. Rep. 516; S. C., 38 Md. 516; *Wood on Nuisance*, 515.—REF.

CASES
IN THE
SUPREME COURT
OF
IOWA.

THE ROYAL INSURANCE CO. v. DAVIES.

(40 Iowa, 469.)

Surety — when death of, does not discharge estate.

The obligors in a bond—one of whom was a surety only—bound themselves, their "heirs, executors and administrators." The surety died, and after his death a breach occurred. *Held*, that his estate was liable.*

ACTION on a bond executed by W. F. Kidder, as principal, and John L. Davies, as surety, against the defendant, as executor [we assume—the original report gives no intimation as to the character of the defendant] of the said Davies. The bond was in substance, that whereas the obligees—the plaintiffs above named—had appointed said Kidder their agent, the said agent should properly discharge his duties and pay over all money, and to this end the obligors jointly and severally bound "ourselves, our heirs, executors and administrators, jointly and severally, by these presents."

The plaintiffs alleged a failure of the agent, Kidder, to pay over certain moneys. The defendant alleged that the said surety, John L. Davies, died on a day named which was prior to the alleged breach, and that his estate became thereby discharged.

The plaintiffs demurred to the answer, and the demurrer being overruled, and judgment rendered for the defendant, plaintiff appealed.

* See *Wood v. Fisk. ante*, 528.

The Royal Insurance Co. v. Davies.

Brown, Campbell & Gould, for appellant.

Davidson & Lane, for appellee.

MILLER, C. J. The question presented in the record is whether the death of Davies, the surety in the bond, operated in law as a discharge of his estate from liability for the default of the principal, happening after the death of the surety. In other words, whether the death of the surety operated to terminate the obligation assumed by him when he executed the bond on his part. It is not claimed on the part of the defendant that the liability of the surety, or his obligation as such, was terminated by reason of any act, or omission of the plaintiff, but it is claimed that the obligation of the surety ceased and the bond became defunct, as to every act done after the death of the surety, by reason of such death alone. By the terms of the bond the surety, Davies, bound himself, his "heirs, executors and administrators," as surety for his principal, Kidder. This language shows no intention to limit the liability to the life-time of the surety; on the contrary it imports that the liability shall continue after his death, and binds his heirs and personal representatives. This intention is further manifested by the subsequent language of the bond, in defining more particularly the obligation assumed by the obligors therein. It is, that, "if the said W. F. Kidder shall promptly pay to the said company the amounts received from time to time, and shall well and truly perform all, and singular the duties as agent of said company, as directed, according to the provisions of the charter, by-laws, rules and regulations of said company now existing, or which may be adopted by said company, *for and during the time he officiated as said agent*, . . . then this obligation shall be null and void, otherwise remain in full force and virtue." This language clearly shows that the obligation of the sureties to the bond was to continue for and during the time Kidder, the principal, should officiate as agent of the company. Of course the death of Kidder would terminate the obligation of the sureties, for thereby the agency of Kidder would terminate. The terms of the bond continue the liability of the sureties as long as Kidder should act as agent of the company, and this liability likewise, by the terms of the bond, extends to the heirs and legal representatives of the sureties. They are bound by as clear and unmistakable language as that which binds the sureties personally. Instead of there being any intent manifested to limit the obligation of the sureties to the terms of their respective lives, it is clearly shown that it was intended the obligation should extend to, and bind the heirs and personal representatives of the sureties, and that the binding force of the

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bond, and the sureties' liability should continue as long as Kidder should act as the agent of the company.

No case exactly in point has been cited by appellant, and no authority whatever is cited by appellee. We are clear, however, that upon the general principles regulating contracts, and the terms of the bond in this case, the death of the surety, Davies, did not terminate the binding force of the bond upon his heirs and legal representatives for the failure of Kidder, while he was the agent of the plaintiff, to pay over money coming into his hands as such agent. The case of *Gordon v. Calvert*, 4 Russ. 581, cited by appellant, supports the view we have here taken.

The court erred in overruling the plaintiff's demurrer to the answer.

Reversed.

COWAN V. THE IOWA STATE INSURANCE COMPANY.

(40 Iowa, 551.)

Fire insurance — alienation — sale by one partner to the firm.

Plaintiff, being the owner of goods which were insured by a policy conditioned to be void in case of alienation, sold the goods to a firm of which he was a member. *Held*, that this was not such an alienation as would avoid the policy.

ACTION upon a policy of insurance against fire, issued to plaintiff, covering a stock of dry goods and merchandise. The petition averred the loss of the property and other facts entitling plaintiff to recover.

Defendant, in the second count of its answer, set out that it was a mutual insurance company, organized under the laws of the State of Iowa, and the following was one of the provisions of its articles of incorporation, printed on the back of the policy, and referred to therein :

“When any property insured in this company shall be alienated by sale or otherwise, the policy thereon shall be void; but in such cases the insured may assign and deliver to the purchaser or purchasers such policy of insurance, and such assignee or assignees shall have all the benefit of such policy, and may bring and maintain a suit thereon in his or her or their own names; *Provided*, that before any loss happens he, she, or they, shall obtain the consent, in writing, of the said company to such assignment, and have the same indorsed or annexed to the same policy.”

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It was also shown that the following condition was printed upon the back of the policy, and expressly made a part thereof.

"Policies of insurance subscribed by this company shall not be assigned without the consent of the company, expressed by indorsement made thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company, in virtue of such policy, shall thenceforth cease, and in case of any transfer or change of title in the property insured by this company, such insurance shall be void and cease, unless assigned with the consent of the company."

It is then alleged that plaintiff violated these conditions by the sale, alienation and transfer of all the insured property to "the firm of Cowan & Haskins, a copartnership composed of plaintiff, Samuel Cowan, and Omar Haskins," and that the goods insured were, at the time of the loss, the property of that firm.

A demurrer to this count of the petition, on the ground that it does not show an alienation or transfer of all the property, but shows that the plaintiff still retained an insurable interest therein, which was covered by the policy, was sustained.

From the judgment of the court upon the demurrer, the defendant appeals.

Craig & Collier, for appellant.

Work & Lea, D. C. Beamen and J. C. Knapp, for appellee.

BECK, J. Nothing less than a transfer of the property insured, whereby plaintiff would part with all his interest therein, would operate to defeat the policy under the condition against alienation, pleaded by defendant. As long as plaintiff retained an insurable interest in the property, the policy attached thereto and protected plaintiff to the extent of his interest. *May on Insurance*, p. 463, § 381; p. 303, § 278; *Hitchcock v. N. W. Ins. Co.*, 26 N. Y. 68; *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289; *Shearman v. Niagara Fire Ins. Co.*, 2 Sweeny, 470; *Fernandez v. Great Western Ins. Co.*, 3 Robertson, 457; *Hoffman v. Place*, 32 N. Y. 405.

The rule is based upon sound reason and the true construction of the clause in question, which neither in its language nor spirit is intended to deprive the insured of the right to dispose of a part of the property by sale or otherwise. This would operate as a restraint upon trade and the free sale and transfer of property to which business men, who most enter

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into these contracts of insurance, would never submit. It is not demanded for the protection of the underwriters, and we have never heard of a construction giving such an effect to a condition against alienation. The condition of the policy before us declares that the instrument shall be void upon the alienation of the property insured, not upon the alienation of a part of it.

In our judgment, the same reasons will support the view that the transfer of an interest in the property to a partner, which is shown by the answer, will also fail under the condition in question, to defeat plaintiff's right to recover. As long as the insured owns the property, or a part of it, or an interest in it that is insurable, the policy during its life covers such part or interest. As the condition cannot be construed into a contract against a sale of a part of the property, neither can it be regarded as an undertaking on the part of the assured not to dispose of an interest in it. These views are based upon the consideration that no increase of risk is wrought by the sale or transfer of a part of, or an interest in, the property insured.

It is well settled that a partner has an insurable interest in the property of the firm.

The transfer pleaded was by the plaintiff to a firm of which he was one of the partners. So far as plaintiff is concerned, whatever interest he retained in the goods never passed out of him. As the transfer is stated in the answer, plaintiff passed the title of the property from himself to another and himself. It is true that, to a certain extent, a copartnership is considered a person separate from the partners who may have transactions, and make contracts with it as such. But it is not true that a partner, by the sale of the property to the firm, actually parts with the interest which, as a partner, he actually holds in the firm property. The answer, therefore, fails to show such an alienation as will defeat the policy and bar all right of recovery by plaintiff.

Cases are cited by defendant's counsel, holding that the sale by one partner to another of his interest in partnership property, upon withdrawing from the firm, or upon its dissolution, avoids the policy issued to the firm, under the condition against alienation. *Finley v. Lycoming Co. Mut. Ins. Co.*, 30 Penn. St. 312; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523; *Doherty & Bumb v. Aetna Ins. Co.*, 15 Mo. 134; *Hartford Fire Ins. Co. v. Ross et al.*, 23 Ind. 180; *Dix et al. v. Mercantile Ins. Co.*, 22 Ill. 272; *Western Mass. Ins. Co. v. Riker*, 10 Mich. 279; *Fallon v. Mut. Ins. Co.*, 1 Selv. 405.

In some of these cases doctrines are found inconsistent with the conclusion we have reached, but we do not think the decisions themselves

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are in conflict therewith. It will be readily seen that by the transfer of the interest of a partner in the joint property to his copartner and his withdrawal from the firm, the parties in interest under the policy are changed. In the case before us, they remain the same; the change only affecting the property covered—the extent of the liability of defendant under the policy, in case of a loss, and without abridging that liability.

The demurrer to the answer was, in our opinion, correctly sustained.

Affirmed.

 STATE V. HOLLYWAY.

(41 Iowa, 200.)

Criminal law — robbery — intent — compelling payment of debt.

Defendant, by means of threats of personal violence and menaces, compelled J. S. to pay to him money which defendant believed to be justly due to him from J. S. Held not to constitute robbery.

INDICTMENT for robbery committed by the use of dangerous and deadly weapons upon the person of one John Hamilton. The opinion states the case. The defendant was convicted and brought the appeal.

J. L. Mitchell, for appellant. When property is taken under claim of right, although the claim be unfounded, the act does not constitute robbery even when force or threats are used. 1 Wheeler's Crim. Cases, 167; 2 East's P. C. 510; 1 Hale, 506-7; 1 Leach, 43; *People v. Hall*, 6 Parker's Crim. Rep. 642; Roscoe's Crim. Ev. 894, and cases cited; 2 Russell on Crimes, 64, 98; 2 Archbold's Crim. Pleading and Practice, 366; Barbour's Crim. Treatise, 175; 8 Iowa, 540. There is no felonious intent in appropriating property which the taker believes to be his own. *People v. Hall*, 6 Parker, 642. If one is induced by false pretenses to pay a debt he justly owes, no indictment will lie therefor. 2 Bish. Crim. Law, 442

M. E. Cutts, Attorney-General, for the State.

MILLER, C. J. The evidence given on the trial shows that about the 18th day of September, 1873, the defendant drove up with a team to the place of business of John Hamilton, in McPaul, Fremont county, Iowa, drew a revolver and threatened Hamilton that if he did not pay him (defendant) money, which the latter claimed was due him from Hamilton, he would shoot

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him (Hamilton); that defendant demanded a settlement and the payment of the amount due to him, admitting that he owed Hamilton a small store account which he consented might be deducted from what he claimed of Hamilton, for calves sold to him by defendant. Hamilton expressed himself ready to settle, and in addition to the account presented to defendant his note procured by Hamilton from a third party, and which, with the account, exceeded the claim of the defendant. The defendant refused to receive the note, but persisted in demand for his payment of the balance of his claim, after deducting the store account, and in his threats of violence in case Hamilton refused. Under these threats Hamilton paid defendant \$10.60, being the balance due him, less twenty cents, and a half sack of flour, which was in consideration of former transactions between them. After getting the money and the flour the defendant left without trying to take or demanding any thing else. This occurred in the afternoon. The defendant had been at Hamilton's store in the morning, and they then had a quarrel.

Appellant proposed to prove that the day prior to the alleged robbery Hamilton had gone to the residence of the defendant for the purpose of purchasing of him some calves; that defendant told Hamilton that his (defendant's) family had been sick for a long time, that he was poor, and his family were out of groceries and provisions and in need of medicines, none of which he could buy without money; that he had nothing else out of which he could make the money, and was therefore compelled to sell the calves, otherwise he would not sell them at all; that they agreed upon the price. Hamilton paying five dollars down and agreeing that the defendant should come to town the next morning and he (Hamilton) would pay him the balance, after deducting a small account held by Hamilton against defendant, in money; that the defendant agreed to this and delivered the calves to Hamilton, who took them home with him. The defendant further proposed to prove that Hamilton had purchased the note on the defendant after he had bought and agreed to pay for the calves in cash. All of this evidence the court rejected, and also ruled from the jury all the evidence before given in regard to the note. The defendant also proposed to prove that the money received from Hamilton was applied in payment of his claim for the calves sold. This was also rejected.

In robbery, as in larceny, it is essential that the taking of the goods be *animo furandi*. Unless the taking be with a felonious intent it is not robbery. If a man, under a *bona fide* belief that the property is his own, obtain it by menaces, that is a trespass, but no robbery. *Rex v. Hall*, 3 Car. & P. 409; *Hawkins' Pleas of the Crown*, ch. 34, § 14. Though the

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defendant take the goods with violence or by putting in fear, yet if he do so under a *bona fide* claim, it is not robbery for the reason that the felonious intent is wanting; 2 Arch. Crim. Pl. and Pr. 366; Roscoe's Crim. Ev. (7th Am. Ed.) 910, and cases cited in the notes; *Rex v. Donnelly*, 1 Leach, 196; 2 Am. Crim. Law, § 1697, and cases cited; and see 1 Russell on Crimes, 872.

If one be induced by false pretenses to pay a debt which he justly owes, already due, no indictment will lie therefor. 2 Bishop on Crim. Law, 442, and cases cited.

In the case of *The People v. Hall*, 6 Parker's Crim. Reports, 642, it was held that if the defendant believed that he was getting his own property back or security for it, then there was no felonious intent. This case not only holds that it is not robbery for a man to take by force or putting in fear property to which he believes he has a just right, but also that to take security for such property under like circumstances is not robbery.

If it be not robbery to forcibly take property from another as a security for that to which the defendant in good faith lays claim as the owner thereof, we do not see how it can be said to be robbery where the defendant by putting in fear compels his debtor to pay that which the defendant in good faith believes to be a just and honest debt then due. The felonious intent is wanting in the latter as well as in the former case. There is no fraud or injury intended in either case. The intent in both is to obtain that which he believes to be his own and nothing more. This rebuts the inference of a felonious intent that would arise from the forcible and unlawful taking. See *The State v. Bond*, 8 Iowa, 540.

In all cases of this kind the question whether the act was done with a felonious intent is one of fact for the jury. *People v. Hall*, 6 Parker's Cr. R., *supra*. The evidence rejected by the court below tended to show that there was no felonious intent on the part of the accused, and it should have been admitted for that purpose. While the evidence rejected did not afford a justification of the act of the defendant, it was admissible to show that it was not a felony, and in this case might authorize a verdict of not guilty of the crime of robbery for which he is indicted.

It may be proper to say that although, in the absence of a felonious intent, it is not robbery to compel, by means of threats of personal violence and menaces, the payment of money against the will of the party menaced, it is nevertheless an offense under the statutes of Iowa. The act is unlawful and punishable under section 3871 of the Code, which provides for the punishment of malicious threats with intent to extort money

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or property, or with intent to compel the person threatened to do some act against his will, and the case comes within this section although the object and purpose of the threats have been accomplished.

The judgment of the District Court must be reversed and the cause remanded for a new trial. *Reversed.*

TALBOTT V. THE MERCHANTS' DESPATCH TRANSPORTATION CO.

(41 Iowa, 247.)

Conflict of law - contract. of affreightment — place of performance.

Plaintiff delivered to defendant at Hartford, Connecticut, goods to be transported to Des Moines, Iowa, and received a bill of lading exempting the defendant from liability for losses by fire. Such exemption was valid in Connecticut but was void in Iowa. The goods were destroyed by fire at Chicago while *en route*. *Held*, that the contract was governed by the laws of Connecticut and the exemption was therefore valid.

ACTION to recover the value of four cases of boots delivered by plaintiff's agent to defendant, a common carrier at Hartford, Connecticut, to be transported by said defendant to Des Moines, Iowa. The plaintiff alleges the acceptance of the goods, an agreement to carry, and the failure to deliver, and claims the value thereof—\$220.38. The defendant, by answer, admits that it is a common carrier, the receipt of the goods and the failure to deliver, and avers want of knowledge as to value. The defendant also avers that by the express terms of said agreement, the goods were to be transported and delivered in Des Moines, in like order as they were received, damages from fire excepted; and that without any fault or negligence of said defendant, said cases of boots were, at Chicago, Illinois, destroyed by fire (in the great conflagration of October, 1871), while in transit from Hartford to Des Moines. The bill of lading containing the agreement was annexed as an exhibit to the answer, and it shows the receipt of the goods in good order and the marks thereon, and states that said four cases of boots are "to be forwarded in like good order (dangers of navigation, collision, and fire, and loss occasioned by mob, riot, insurrection or rebellion, and all dangers incident to railroad transportation excepted), to depot only, he, or they, paying freight and charges for the same as below."

The plaintiff demurred to the answer because, 1. It does not allege that plaintiff has assented to the alleged agreement. 2. It does not show that the loss of said goods occurred through any exception men-

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tioned. 3 The agreement stipulated for absolute exemption from liability, even though the loss occurs through the negligence of defendant, and is therefore against public policy and void.

This demurrer was sustained, and, the defendants electing to stand upon the answer, judgment was rendered for plaintiff for the amount of the claim. The defendant appeals.

Barcroft & Given, for appellant. The contract of affreightment, being entire and indivisible, and to be partly performed in the place where made, must as to its validity, nature, obligation, and interpretation, be governed by the *lex loci*. *McDaniel v. The C. & N. W. Ry. Co.*, 24 Iowa, 412, *Naylor v. Baltzell*, Taney's C. C. 61; *Pope v. Nickerson*, 3 Story, 484. The written agreement signed by defendants and delivered to plaintiff, without more, is sufficient evidence of assent to its terms. *Mulligan v. Ill. Cent. R. Co.*, 36 Iowa, 181.

Gatch, Wright & Runnells, for appellee. A contract of affreightment is performed by delivery of the goods at the point of destination. *Naylor v. Baltzell*, Taney's C. C. 61; *Pope v. Nickerson*, 3 Story, 484; *Atlantic, etc., Co. v. Johnson*, 4 Rob. 474; *Cope v. Cordova*, 1 Rawle, 203. The law of the place where a contract is to be performed must govern in determining its validity and effect. *Andrews v. Pond*, 13 Pet. 77-8; *Hyatt v. Bank*, 8 Bush, 199. By the law of Iowa, where this contract was to be performed, the contract of exemption relied on by defendant was illegal. Code of 1873, § 1308; *McDaniel v. C. & N. W. R.*, 24 Iowa, 416. Assent to the conditions of a contract cannot be inferred from silence, when those conditions are contrary to the law under which they are to be construed. *R. R. Co. v. Mfg. Co.*, 16 Wall. 328; *Mich. Cent. R. R. Co. v. Hale*, 6 Mich. 257. A contract must be construed most strongly against the beneficiary. *Atwood v. Reliance Trans. Co.*, 9 Watts, 88. The contract was a contract of insurance against all but specified risks, and the answer should show that the destruction was through one of those risks. *Spence v. Chodwick*, 59 E. C. L. 526; *Atkinson v. Ritchie*, 10 East (2d Am. ed.), 489. Implications will not be indulged in. Angell on Corp. 226a.

COLE J. It is conceded by the respective counsel that the contract as shown by the bill of lading, containing exceptions from liability for loss by fire, was valid and binding in Connecticut. *Lawrence v. N. Y. P. B. R. R. Co.*, 36 Conn. 63; and in Illinois, *I. C. R. R. Co. v. Morrison*, 19 Ill. 136. And that, by Chap. 13, Laws of 11th G. A. of Iowa, it was enacted "that in the transportation of persons or property by any railroad

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or other company, or by any person or firm engaged in the business of transportation of persons or property, no contract, receipt, rule or regulation shall exempt such railroad or other company, person or firm from the full liabilities of a common carrier, which, in the absence of any contract, receipt, rule or regulation, would exist with respect to such persons or property" (see Laws of 1866, p. 121), and that thereby the exceptions in the bill of lading in this case would be inoperative and void in Iowa. The main question, therefore, presented in this case is, whether the contract of affreightment shall be governed by the laws of Connecticut or of Iowa. Respecting the general rule that a contract valid where made is valid everywhere, and that where a contract specifies a place of performance it is to be interpreted by the law of that place, the counsel are also agreed. The question of difficulty in this case is in determining the place of the performance of the contract.

It was held by this court in *McDaniels v. The C. & N. W. Ry. Co.*, 24 Iowa, 412, that a contract of affreightment made in Iowa for the transportation of cattle by railroad from Clinton, Iowa, to Chicago, Illinois, and for their delivery at the latter place, was to be determined by the laws of Iowa, for that the contract was made in Iowa, and was therein partly to be performed. Applying the rule of that case to this, it seems necessarily to follow that since this contract was made in Connecticut and was there to be partly performed, its validity and effect should be determined by the law of that State. But, without determining that such a rule should be applied to its full extent to every contract or even to this, we here ground our decision of this cause upon the special facts of the case which show that the contract as made was valid in Connecticut, where the contract was made, and in Illinois, where the loss occurred. Whether a different rule would apply if the defendants had entered upon the performance of their contract in Iowa, and the loss had there occurred, we need not determine.

Our conclusion in this case may be rested upon the general principle, that when there are several possible local laws applicable to the case, that law is to be applied which is most favorable to the contract; or, to state the same rule in other phraseology, when there is a conflict of applicatory laws the parties are presumed to have made part of their agreement that law which is most favorable to its validity and performance. See Wharton on Conflict of Laws, § 429, and authorities there cited. *Arnold v. Potter*, 22 Iowa, 194. The answer, by its admission of the execution of the agreement, by fair implication, if not necessarily, admits that it was accepted or assented to by the plaintiff. Such acceptance, without more, would bind him. See *Mulligan v. Ill. Cent. R. R. Co.*, 36 Iowa, 181.

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A fair construction of the exception would exempt the defendant from liability from loss, without its negligence, by fire, although such fire did not result from collision. In other words, the exception relates to the loss either by collision or fire, and not alone from loss resulting from "collisions and fire." Our conclusion, therefore, is that the answer presents a sufficient defense and that the court erred in sustaining a demurrer thereto.

Reversed.

RODEMACHER V. THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

(41 Iowa, 297.)

Constitutional law — railroad companies subject to changes of the general laws — liability for damage from fire.

A statute provided that all railroad corporations should be liable for damages from fires caused by the operating of such railroad. *Held*, valid and constitutional as to railroads incorporated before the statute was passed.

THE petition of plaintiff claimed one hundred and fifty dollars, on account of damages alleged to be done his fences and timber from a fire started by an engine on defendant's road.

The answer, amongst other defenses, alleged that in January, 1868, there was incorporated under the laws of the State of Iowa, a company known as the McGregor & Sioux City Railway Company. That during the year 1868 and 1869 said corporation constructed the road near which the injuries occurred. That said corporation procured from the then owner of the tracts of land upon which the property alleged to have been injured and destroyed was situated a strip of land one hundred feet in width, for the location and operation of the road, and that the McGregor & Sioux City Railway Company, in 1869, conveyed by deed to defendant.

The plaintiff demurred to the count of the answer setting forth the above defenses, and the demurrer was sustained. The cause was then submitted to the court upon the following agreed statement of facts: "The plaintiff owns the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 1, all in town 95, range 15, and, on the 11th day of October, 1873, had the same fenced and improved with an ordinary fence; outside of his fence was open prairie and timber land belonging to others, and the ordinary and natural growth of grass and weeds standing thereon, dry and dead, as grown, and on the land on which the fence was situated. The railroad track of defendant passes along the north line of sections 1

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and 2, town 95, range 15. The fire started in dry grass accumulated near the end of the ties of said track about the center of section 2, and ran out across the railroad land, or right of way, and burned out toward the center of said section 2, and then angling across section 1 to plaintiff's farm, through the dry grass aforesaid, where the injury complained of was done. The fire originated from, and by means of a passenger train going west on said railroad track, and operated by said company, and the damages done were one hundred and twenty-five dollars."

The court thereupon rendered judgment for plaintiff for \$125.00 and costs. Defendant appeals.

Thomas Updegraff, for appellant. A general incorporation law is general only in the sense that it is open to all who desire to avail themselves of its provisions, but it constitutes a special charter to each body organized under it. *State Bank of Ohio v. Knoop*, 16 How. 369. Every valuable privilege given by the charter which conduced to the acceptance of it is a contract which cannot be changed by the legislature where the power to do so is not reserved. *Dodge v. Woolsey*, 18 How. 331. The charters of railroads and similar corporations constitute as between them and the State contracts, and any essential alteration in them, made after acceptance and expenditure of money under them, is void. 3 Pars. on Cont. (6th ed.) 632; Angell and Ames on Corp., § 767; Cooley on Const. Lim. 273. Sovereignty in government has no existence in fact. 1 Dana, 500. The police power of the State cannot be exercised to violate contract obligations, but only to prevent unnecessary injuries. Cooley on Const. Lim. 572. It may well be doubted whether that is a proper police regulation which imposes a new obligation for the benefit of others, upon a party guilty of no neglect of duty. *Id.* 581. Where similar statutes have been sustained—in Maine and Massachusetts,—an insurable interest is given to the railroad companies, and it has been held that the statute does not apply to property, which in its nature is not capable of insurance. 1 Redf. 479; Pierce on Am. R. R. L. 319; 37 Me. 92. Every alteration of a contract, however unimportant, impairs its obligation. The degree of impairment is immaterial. 4 Wheat. 518; 16 Wall. 314; 10 Barb. 87; 18 id. 585; 21 id. 499; 21 N. Y. 1; *Washington Bridge Co. v. State*, 18 Conn. 53; *Bailey v. R. H.*, 4 Harrington, 389; 13 Am. L. R. (N. S.) 174; *Com. v. Penn. Canal Co.*, 66 Penn. 41; 5 Am. Rep. 329, and cases cited. A railway company, by its contract securing right of way, acquires the vested right to contract and operate its railway in a careful and proper manner over the premises affected, subject only to liability for the negligent or improper exercise of the right. 2 Iowa,

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288. The exposure to destruction, by fire, of property adjacent to a railway forms a proper element in the estimation of damages. 1 Redf. on Railways, 303-5; 1 Foster, 359; *Snyder v. W. U. R. R.*, 25 Wis. 60; *W. & R. R. Co. v. Stauffer*, 60 Penn. St. 374. Railway companies, having acquired the right to the use of the right of way, cannot be again compelled to pay for that for which compensation has already been given. *Com. v. Essex Co.*, 13 Gray, 239; *Milliman v. O. & S. R. R.*, 10 Barb. 87; *Marsh v. N. Y. & E. R. R.*, 14 Barb. 370; *Tombs v. R. & S. R. R.*, 18 id. 585. One who could have prevented destruction of his property by burning the dry accumulations about it, or employing other means common with the owners of property similarly situated, is guilty of contributory negligence. *Kesee v. C. & N. W. R. R. Co.*, 30 Iowa, 78; *O. & N. W. R. v. Shanfelt*, 47 Ill. 497. Whenever a new liability or right is created, and a new remedy provided, that remedy is exclusive. 3 Hill, 38; 1 Hill on Torts, 118-9.

Boulton & Duncan, for appellee. For all the purposes of this case the defendant stands in the position of a natural person. 13 Am. Law Reg. 187; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *R. F. & P. Ry. v. Louisa Ry.*, 13 How. 71; *Turnpike Co. v. The State*, 3 Wall. 210; *Boston & Lowell Ry. v. Salem & Lowell Ry.*, 2 Gray, 1; *Pontchartrain Ry. v. N. O. C. L. P. Ry.*, 11 La. Ann. 253. The police power of the State extends to the protection of all property within it. Cooley on Const. Lim. 573. In enacting the statute in question, the legislature has only re-asserted the common law; it has avoided all constitutional encroachment. *Lyman v. B. & W. Ry.*, 4 Cush. 288; *Norris v. Androscroggin Ry.*, 39 Me. 273. Plaintiff was not required to burn the accumulations of grass and weeds to prevent the destruction of his property. *Kellogg v. C. & N. W. R. R.*, 26 Wis. 223. Questions in a law case must be raised in the court below, to entitle them to consideration in the supreme court. *McNaught v. C. & N. W. R. R. Co.*, 30 Iowa, 336.

DAY, J. This case involves the constitutionality of the latter clause of section 1289 of the Code of 1873, which is as follows: "That any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway, and such damages may be recovered by the party damaged in the same manner as set forth in this section in regard to stock, except as to double damages."

In this State corporations are created under a general incorporation law. The Revision, section 1158, Code of 1873, section 1058, provides:

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Any number of persons may associate themselves and become incorporated for the transaction of any lawful business, including the establishment of ferries, the construction of canals, railways, bridges, or other works of internal improvement ; but such incorporation confers no power or privilege not possessed by natural persons except as hereinafter provided. The next section enumerates certain powers of a corporation which are, to have perpetual succession, to sue and be sued in the corporate name, to have a common seal, to render the interest of the stockholders transferable, to exempt the private property of its members from debt, to make contracts, acquire and transfer property, to establish by-laws and make rules and regulations in accordance with law. The possession of these powers, together with the right to carry on the business for which the corporation is created, and the right to exercise all the incidental powers essential to a proper enjoyment of the powers specifically conferred, constitute the franchise of the corporation, which exists in virtue of contract between the State and the corporation and may not be essentially abridged or impaired by the legislature. In the case of *Dartmouth College v. Woodward*, 4 Wheaton, 518, Chief Justice MARSHALL says "a corporation is an artificial being, the mere creature of the law ; it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its existence." And in *Providence Bank v. Billings*, 4 Peters, 514, the same judge says : "The great object of an incorporation is to bestow the character and properties of individuals on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist." This must be especially true under our general incorporation law, which enacts that, except as otherwise provided, an article of incorporation confers no power or privilege not possessed by natural persons. It is claimed by appellant that the statute in question (Code, § 1289) impairs the contract existing between the State and the corporation under which its charter is conferred. The defendant's charter authorizes it to construct and operate a railroad, and as incidental to this right, confers upon it all the powers necessary to its proper enjoyment.

Any legislation which deprives the defendant of the right to operate its road would clearly be an infraction of contract, and unconstitutional.

But there is no implied contract between a State and a corporation that there shall be no change in the laws existing at the time of the incorporation which shall render the use of the franchise more burdensome or less lucrative, any more than there is between the State and an individual that the laws existing at the time of the acquisition of property shall

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remain perpetually in force. See *Thorpe v. The Rutland & Burlington Ry. Co.*, 27 Vt. 140. An individual may turn all his real estate into money, for the purpose of making loans when the legal rate of interest is ten per cent, yet there can be no doubt that a legislature could afterward reduce the legal rate to six per cent, thus materially lessening his profits and affecting the value of his property. And the same thing can be done with respect to a corporation. In 9 Cushing, 604, it is determined that the Provident Institution for savings, in the town of Boston, chartered in the year 1816, is subject to the general laws of the Commonwealth, passed since that time, relating to investments of deposits by savings banks and institutions for savings, and that, although the institution, at the time it was incorporated, had the right and power under the general laws, to loan money at six per cent interest, yet there can be no doubt that the legislature could alter the law so that the institution could take only four or five per cent. In the course of their opinion, the court say: "It may, perhaps, be said that the corporation, at the time it took its charter, could invest its deposits at its own discretion without restriction as to the modes of investment. Be it so. But it thus acted, not by virtue of any especial power or privilege granted in the charter, in relation to investments, because the charter is silent upon that subject, but wholly under and by virtue of the general laws of the Commonwealth. No special power or privilege being given in the charter, as to the mode of conducting its business, the corporation managed all its affairs according to the general laws. It took its charter subject to the general laws, and of course, subject to such changes as might be rightfully made in such laws. The legislature, surely, did not guarantee to the corporation that there should be no change in the laws, that the whole system of legislation should remain as it was in 1816."

In *The Ohio and Mississippi Railroad Company v. McClelland*, 25 Ill. 140, it was held that an act requiring all railroads then completed and open for use to be fenced, and imposing a penalty for all damages which may result, although such requirement was not expressed in their charters, did not contravene a provision of the constitution of that State similar to our own constitution. In announcing the opinion, the court said: "In granting this charter, the legislature has not, in terms, surrendered the right to subject it to general police regulations. If such a result has ensued, it is alone by implication. But we have seen that, in the absence of express language, such an exemption cannot be inferred. When these bodies are created, although they are artificial persons, intangible, and only existing in legal contemplation, they are held to be subordinate to, and under the control of the government, to the same

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extent as individuals. They have at all times been required to conform to the general laws of the State, precisely as if they were real and not artificial persons. To hold otherwise would be to say that the legislature might create an *imperium in imperio*." In *Gorman v. Pacific Railroad*, 26 Mo. 441, the same conclusion was reached, where the charter contained no reservation to the legislature of such power. In this case the court said: "It is insisted that by the original charter of the company, as amended previously to the passage of the act of 24th of February, 1853, there was no constitutional authority in the general assembly to alter its charter by imposing upon it the burden of fencing the road, an obligation which was not imposed by the original law creating the company. * * * It is settled that a private charter is a contract between the government and the company to which it is granted, and that, as such, it is secured by the Constitution of the United States from violation by the State conferring it. But while private charters are thus protected, it is also true that corporations, like natural persons, are subject to those regulations which the State may prescribe for the good government of the community. There is no reason why corporations should not be subject to police regulations, as well as natural persons." In *Thorpe v. The Rutland and Burlington Railroad Co.*, 27 Vt. 140, the same conclusion was reached, in which case Mr. Chief Justice REDFIELD, announcing the opinion of the court, said: "It must be conceded that all which goes to the constitution of the corporation and its beneficial operation is granted by the legislature and cannot be revoked, either directly or indirectly, without a violation of the grant, which is regarded as impairing the contract, and so prohibited by the United States Constitution. And if we suppose the legislature to have made the same grant to a natural person which they did to defendants, which they may undoubtedly do (*Moor v. Veazie*, 32 Me. 348; S. C. in *Error in the Sup. Ct., U. S.*, 4 Peters, 568), it would scarcely be supposed that they thereby parted with any general legislative control over such person, or the business secured to him. But it must, in fact, be the same thing when applied to a corporation, however extensive. In either case the privilege of running the road, and taking tolls, or fare, or freight, is the essential franchise conferred. Any act essentially paralyzing this franchise, or destroying the profits therefrom arising, would, no doubt, be void. But beyond that, the entire power of legislative control resides in the legislature, unless such power is expressly limited in the grant to the corporations." See, also, *Bank of The Republic v. County of Hamilton*, 21 Ill. 53; *Galena and Chicago Union Ry. v. Loomis*, 13 id. 548; *Norris v. Androscoggin Ry. Co.*, 39 Me. 273; *The People v. Thomas Gallagher*, 4 Mich. 244.

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In the above cases, from 25 Ill., 26 Mo., and 37 Vt., the statutes considered were enacted after the various railroads affected by them had been constructed under charters imposing upon the roads no obligation to fence, and when the general statutes contained no such requirement. When the railroads were constructed the companies had a right to operate them without fences, and they were liable for damage to stock only in the case of negligence. The effect of these statutes was, not to take away the franchise—the right to operate the road—but to impose upon it conditions and subject it to burdens which did not exist when the franchise was granted. The exercise of the rights conferred was made more expensive and less profitable. Precisely such is the effect of the statute under consideration. It differs, perhaps, in the degree of the burden which it imposes, but it will be difficult to show wherein it differs in principle. If the general incorporation law of the State had contained a provision that all railroads incorporated under it should be absolutely liable for all damages by fire, occasioned in the operation of the road, it would not, we suppose, be contended that such a provision would be repugnant to any constitutional requirement. This shows that it does not contravene any just notion of property, that the owner of it should be liable for the damages occasioned by its use. It is true the generally received doctrine is that, for a lawful and reasonably careful use of property, the owner shall not be made answerable in damages. But this is simply a principle of the common law. It is not so wrought into the idea of property, nor is it so hedged about by the constitution that the legislature may not change it. It is a principle of the common law that the owner of vicious domestic animals shall not be liable for the injuries they inflict, until he has had knowledge of their vicious propensities, and neglects to restrain them. Yet it would scarcely be claimed that an act of the legislature making the owner liable for such injuries, without such knowledge, would be unconstitutional. That would be a case in which one of two equally innocent persons must suffer, and it certainly would be as competent for the legislature to declare that the loss shall be borne by the owner of the animal, as it now is for the common law to visit the loss on the person injured.

If, then, in the nature of the interests involved, there could have been no objection to a general provision in the incorporation law making railroads liable for all damages occasioned by fire, there can in the nature of such interests be no valid objection to imposing such liability after the incorporation of the company, for the law contains no guaranty that a corporation shall be exempt from such interference. The right to enact the statutes above considered is derived under the police power of the

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State. To the same power is referred the right to establish regulations requiring existing railways to ring the bell or blow the whistle at public crossings, and also to enact laws giving a right of action to the representatives of persons killed by the wrongful act of another. If the statute in question can be brought under the general police power of the State, its constitutionality will not be questioned. This police power is very extended in its application. It cannot take the property of A and vest it in B, for this the constitution expressly prohibits. But short of this limit it is difficult to impose upon it any restriction.

In *Thorpe v. Rutland and Burlington R. R.*, *supra*, REDFIELD, Chief Justice, says: "This police power extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State." And in *Commonwealth v. Alger*, 7 Cush. 84, Chief Justice SHAW says: "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth is * * * held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain—the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise."

In the *License Cases*, 5 How. 504, Mr. Chief Justice TANEY, on page 583, says: "But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty, to the extent of its dominions. And whether a State passes

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a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it regulates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States."

The case of *The Commonwealth v. Certain Intoxicating Liquors*, 115 Mass. 153, is strongly in point. In that case complaint was made, under the statutes of 1869, chapter 415, section 44, against certain intoxicating liquors alleged to have been deposited by Patrick O'Connell in a certain vehicle, and being conveyed by him to some unknown person. The Boston Beer Company appeared and claimed an interest in certain of the liquors seized. At the trial it was agreed that the Boston Beer Company was incorporated under the statute of 1827 for the purpose of manufacturing malt liquors in the city of Boston, and that the liquors claimed by the Boston Beer Company were malt liquors, and were manufactured and owned by the said corporations, and were being transported by O'Connell, as its agent, to its place of business for the purpose of sale.

The claimant asked the court to instruct "that the statute of 1869, chapter 415, and the acts in addition thereto prohibiting the manufacture and sale and the transporting of intoxicating liquors, impair the obligation of the contract contained in the charter of said company, and are in violation of the Constitution of the United States, and not therefore binding on said company."

The court held that this instruction was properly refused. In the course of the opinion the court said: "The authority of the legislature over the property, or the use of the property, of a corporation is not lost because no power is reserved to repeal or amend its charter. Any laws the sovereign power may find it necessary or salutary to enact, regulating, controlling, restricting or prohibiting the sale of a particular kind of property for the general benefit, apply as well to the property of corporations, like the claimant, as to individuals. Such laws are in the nature of police regulations, and individuals and corporations are alike subject to them. Indeed, all property is held subject to them, and it is immaterial that the restriction is imposed after the property is acquired, or becomes valuable, or after the charter is granted, or before it became necessary, in the judgment of the legislature, to pass a law on the subject. Every such law limits, restrains, impairs, and in some cases destroys the uses which were previously enjoyed of the property so made the subject of

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legislation, but the extent to which it may do so does not affect the validity of such laws, or their equal application to the owners of such property. They are presumed to be passed for the common good, and to be necessary for the protection of the public, and cannot be said to impair any right or the obligation of any contract, or to do any injury in the proper and legal sense of these terms." See *Brick Presbyterian Church v. New York*, 5 Cow. 538.

It would seem that a power so nearly omnipotent must be potent enough to require that the owner of property shall be liable for the damages its use occasions.

Our Constitution provides that private property shall not be taken for public use without just compensation. Yet the very law under which defendant is incorporated authorizes the incorporation of railways, and the employment of a species of locomotion which experience has proved is very destructive to private property. The constitutional right to do so has never, as we are aware of, been questioned, and it would startle the legal mind if it should be questioned at the present day. If, then, the legislature may authorize to be put in force a power which, in some instances and under some circumstances, will cause damage to private property, why may not the legislature also say that the person who employs that force shall be answerable for the damages which it occasions? The statute simply recognizes the doctrine that the use of the locomotive engine is the employment of a dangerous force; that sometimes, notwithstanding the exercise of the highest care and diligence, it will emit sparks and cause destructive conflagrations; that when this occurs loss must fall upon one of two innocent parties; that heretofore that loss has been borne by the owner of the property injured; hereafter it shall be borne by the owner of the property causing the injury. In *Conn v. May*, 36 Iowa, 240, we held, under a statute of this State, that the person who, at a certain season of the year, places out fire upon his own premises and allows it to escape, is absolutely liable for the injuries occasioned. Although that case was twice argued before us counsel did not even suggest a doubt as to the constitutionality of the law. In 1840 a statute was passed in the State of Massachusetts in all respects similar to ours except that it gives the railroad corporation an insurable interest in the property for which it may be held responsible in damages. Statutes of 1840, chapter 85. In *Lyman v. The Boston & Worcester Ry. Co.*, it was enforced against a railroad established before its passage. The question of its constitutionality was not raised.

What the policy of this legislation may be experience alone can show. It may be that it will prove to be unreasonably severe, and to stand in

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the way of material progress and the best interests of the country at large. It may, upon the other hand, promote a high degree of skill and care, and stimulate the invention and use of improved appliances, lessening the danger of fires, and greatly increasing the safety of property, without any detriment to public interests. With these questions we have nothing to do.

For us it is enough to know that the statute contravenes no constitutional provision, state or national; and that it does not do so we entertain no doubt.

The other questions were not important.

We discover no error in the record.

Affirmed.

STATE V. WHITE.

(41 Iowa, 316.)

Criminal law — intent to commit crime — intent need not be proved as laid.

Upon the trial of an indictment for an assault with intent to commit murder, the defendant may be convicted of an assault with an intent to commit manslaughter. (See note, p. 604.)

INDICTMENT for "an assault with intent to commit murder." The defendant was convicted of an "assault to commit manslaughter."

Pollock & Shields, for appellant.

M. E. Cutts, Attorney-General, for the State.

BECK, J. An opinion was filed at the Davenport October term, 1875, in this case, reversing the judgment of the District Court. Thereupon the attorney-general, within the time prescribed by the rules of this court, filed a petition for re-hearing, which was allowed, and the case was again submitted upon the re-argument. At the following December term the cause was again before the court for decision, and a conclusion was reached, concurred in by all the justices then occupying the bench, contrary to the

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opinion before filed, and it was then decided that the judgment of the district court be affirmed. The cause was assigned to one of the justices, who soon thereafter ceased to occupy a seat on this bench, for the preparation of an opinion in accord with our decision. This, however, he was unable to do before the expiration of his term of office, and, with others this case stood for re-assignment at the first meeting of the court as it is now organized. Through some oversight, the cause was not re-assigned, and for that reason, escaped our attention until our last term. Upon another consideration by the court, as now constituted, we have unanimously reached the conclusion, agreeing with the decision upon the re-argument, that the judgment of the District Court ought to be affirmed.

Under the rules of this court, opinions in cases whereon petitions for re-hearing are filed, are not to be published in the reports until the final disposition of the petition for re-hearing or the decision of the case upon argument. Through another oversight, this rule was not observed in this case, and the opinion found its way into the reports. See 41 Iowa, 816.

We will proceed briefly to consider the only question involved in the case. Counsel for defendant insist that the conviction for an assault with intent to commit manslaughter upon an indictment for an assault with intent to commit murder is erroneous. This position presents the point we are called upon to decide.

Code, section 3872, prescribes the punishment for the crime of an assault with intent to commit murder. Sections 3874, 3875, provide for the punishment of assault with intent to maim, rob, steal, to commit arson and burglary, and to inflict great bodily injury. No other provisions are found for the punishment of assaults with intent to commit crimes specifying such offenses by name. But section 3876 is in these words: "If any person assault another with intent to commit any felony, or crime punishable by imprisonment in the penitentiary when punishment is not otherwise prescribed, he shall be punished by imprisonment in the penitentiary, not exceeding five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail not more than one year."

The following sections of the Code must be considered in determining the question before us:

"Sec. 4465. Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the offense charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense, if punishable by indictment."

"Sec. 4466. In all other cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment."

Under section 3876, an assault with intent to commit manslaughter may be indicted and punished.

Murder is the felonious killing with malice. Manslaughter is the felonious killing without malice. The crime of manslaughter is not a degree of the crime of murder, but is a distinct offense included in the crime of murder. Under section 4466, one indicted for murder may be convicted of manslaughter. These positions are too apparent to demand argument in their support. The same conclusions must follow in regard to the offense of an assault to commit these crimes. An assault with intent to murder covers the intent to unlawfully kill with malice. An assault with intent to commit manslaughter includes only the intent to kill unlawfully without malice. The intent to kill unlawfully without malice is necessarily included in the intent to kill unlawfully with malice. Remove the ingredient of malice in the last case and you have the first. It follows that an assault with intent to commit manslaughter is necessarily included in an assault with intent to murder; one indicted for the last crime may, under section 4466, be convicted of the first.

These views are supported by the following cases, which are directly in point upon the question: *State v. Butmon*, 42 N. H. 490; *State v. Waters*, 39 Me. 54; *State v. Phinney*, 42 id. 884; *State v. Nichols*, 8 Conn. 496; *Beckwith v. People*, 26 Ill. 500; *People v. Kennedy*, 5 Cal. 188; *People v. English*, 30 id. 214; *State v. Reno*, 40 Vt. 508; *Wall v. The State*, 28 Ind. 150; *People v. Coughton*, 44 Cal. 92.

In *The State v. Jarvis*, 21 Iowa, 45, this court held that an assault with intent to commit murder necessarily included a simple assault, and under section 4466, which is section 4889 of the Revision of 1860, and section 3039 of the Code of 1851, a prisoner indicted for the first named crime could be convicted of the offense last mentioned. If upon an indictment for an assault with intent to commit murder, a prisoner may be convicted of an assault simple, on the ground it is included in the crime alleged in the indictment, it follows that assaults of a higher degree of criminality are also included in the offense charged, for which there may be conviction.

The judgment of the District Court is

Affirmed.

NOTE.—In the 41 Iowa, 316, the opinion in the foregoing case, delivered on the original hearing, was reported and was selected for and printed in this volume of the *AMERICAN REPORTS*. Immediately on the appearance of this volume, we were informed that on a rehearing, the judgment first delivered had been reversed (the constitution of the court having changed), and the foregoing opinion delivered. The case, therefore, as it appears in the first edition of this volume is erroneous in not giving the final determination of the court.

The same conclusion as that reached in the foregoing case on the rehearing, was reached by the Supreme Court of Indiana in *State v. Throckmorton*, 53 Ind. 354. In delivering the opinion Downer, J., said: "We are aware that many criminal lawyers of this State are of the opinion that there can be no such thing as an assault or an assault and battery with

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intent to commit manslaughter. It is said by Judge Bicknell, in his work on Criminal Law, that there can be no indictment for an assault and battery with intent to commit the crime of manslaughter; because the peculiarity of manslaughter is that it is free from the unlawful intention to kill. Bicknell's Criminal Practice, 392. It is a mistake to say that there can be no unlawful intention to kill in voluntary manslaughter. *Murphy v. The State*, 31 Ind. 511. Mr. Bishop, in his work on Statutory Crimes, section 508, expresses the opposite view to that taken by Judge Bicknell, and thinks such view contrary to the actual course of things in the other States, and 'not sound as general American doctrine.' In New Hampshire there was a statute providing 'that if any person shall make an assault upon another with an intent to commit any crime described in this chapter, the punishment whereof shall be, etc., he shall be punished,' etc., and manslaughter was among the crimes described. It was held that this provision embraced among the rest an assault with intent to commit manslaughter. *The State v. Calligan*, 17 N. H. 253. In *Murphy v. The State*, *supra*, the court in speaking of the instructions given said: 'By these instructions the jury were told in effect that there could be no purpose to kill in manslaughter, and that if such a purpose were shown to exist, the killing would be murder.' This, we think, is not a correct exposition of the law. The killing may be unlawful and purposely done, and yet if it is done without malice in a sudden heat and transport of passion caused by sufficient provocation, it is only manslaughter. It was so held in *Dennison v. The State*, 13 Ind. 510, etc. A reference to the case in 13 Ind. will show that the question was there so decided. The case of *Dennison v. The State* is cited, and followed in *Hoss v. The State*, 13 Ind. 349, and *Long v. The State*, 46 id. 532."

In Mississippi it is held, that one indicted for assault with intent to kill and murder, cannot be indicted of assault with intent to commit manslaughter. *Bedell v. State*, 30 Miss. 492; *Morgan v. State*, 34 id. 35.

TURNER V. HAWKEYE TELEGRAPH COMPANY.

(41 Iowa, 458.)

Telegraph—error in market report—presumption of negligence—damages.

Defendant, a telegraph company, agreed to furnish plaintiff, a grain dealer at S., with daily reports of the grain market at C., a point beyond defendant's line. By reason of an error in the report plaintiff was induced to purchase a quantity of grain to fill a contract for future delivery. *Held*, (1) that in the absence of evidence it would be presumed that the report was correctly delivered to defendant at the point where his own line commenced; (2) that in the absence of evidence it would be presumed that the error occurred through defendant's negligence, and (3) that the measure of damage was the difference between the actual purchase-price and the price as represented in the report.

ACTION to recover damages. The opinion states the facts.

Brown, Stone & Sears, for appellant.

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Porter & Moir, for appellee.

BECK, J. Plaintiff is a grain dealer doing business at Steamboat Rock, Harding county, and the defendant is a corporation operating a telegraph line from Albia to Northwood, having an office at plaintiff's place of business. The defendant contracted to furnish plaintiff at Steamboat Rock daily dispatches, showing the prices of grain, both in Chicago and New York, for the consideration of ten dollars per month. Under this contract, on the 17th day of August, 1874, the defendant's agent delivered to plaintiff a dispatch showing the market price of wheat in Chicago to be \$1.21½ per bushel. This report was incorrect; on that day the price was \$1.56. Upon the strength of this information, plaintiff directed his commission merchants at Chicago, by telegraph, to purchase 5,000 bushels of wheat, to fill a contract for the delivery of that quantity during the month of August. Under this order the purchase was made on the 19th, the intervening day being Sunday, at the price of \$1.50 per bushel. August 20th the price of wheat dropped to \$1.12, and on the following day it was \$1.12½. The price of the grain under plaintiff's contract to deliver the 5,000, was \$1.32 per bushel. Plaintiff claims to recover as his damages, the difference between the value of the grain at \$1.50, the price paid by him, and \$1.21½, the price as reported by defendant, being 28½ cents per bushel, which makes the total sum upon 5,000 bushels purchased, \$1,425. This sum, together with interest thereon, he claims, is the measure of his damages.

The court found the contract declared upon, and facts as above set out, and further that "the defendant's telegraph line was not in good, perfect working order, and the dispatch delivered and furnished to plaintiff was not correctly transmitted on account of the negligence and want of care of defendant and their (its) agents and employees." Judgment was rendered for the sum of \$1,425, the difference between the price of wheat as reported, and the price paid by plaintiff for the 5,000 bushels, purchased to fill his contract.

I. Defendant's counsel insist that the finding of the court is in conflict with the evidence and the law. They, among other objections to the judgment, insist that there was no proof of the negligence of defendant; that the burden of establishing negligence in sending the dispatch, reporting the price of grain, rested upon plaintiff, and as he offered no sufficient evidence of that fact, he failed to make out a case against defendant. The point may be briefly disposed of. Defendant's line of telegraph did not extend to Chicago, but at Grinnell it connected with another line reaching to that city, from which the market reports were

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obtained, and sent by defendant to different points on its line. It is insisted by defendant that plaintiff failed to show that a correct report was furnished, to be sent from Grinnell upon defendant's line. The evidence shows that the market reports were received at Grinnell on the day the incorrect one was delivered to plaintiff. Upon this evidence we must presume that the reports received there and delivered to defendant were correct. The rules of evidence, in the absence of proof showing the report delivered to defendant at Grinnell to be either correct or incorrect, require us to presume it to have been correct. They are based upon the fact that men ordinarily, in the course of business, act correctly and speak truly. Errors and intentional misstatements are exceptions, and not the rule in the affairs of business. Their application in this case is demanded by the fact that the evidence to establish error in the report furnished defendant was within its control and exclusive knowledge. Plaintiff was utterly unable to prove the correctness of the report furnished at Grinnell, while, if it had been incorrect, defendant could have readily established the fact. Still another reason may be assigned in support of our ruling upon this point. The agent of defendant, as he testifies, destroyed all the memoranda and papers in his office at Grinnell, pertaining to the transaction. These, it is presumed, would have shown whether the report was correctly made to defendant. This circumstance, without satisfactory explanation of the cause for this act, raises a presumption against defendant, as it is hardly reasonable to suppose that the papers would have been destroyed, if they had contained evidence relieving defendant of the charge of negligence.

II. Counsel insist that the evidence is not sufficient to charge defendant with negligence. As we have seen, the presumption of the law is that the report received by defendant for transmission was correct. It must be presumed that ordinarily, by the exercise of proper care, it would have been correctly transmitted. The burden was then thrown upon the defendant to show that the error occurred from causes or conditions that relieved defendant of responsibility. As it was delivered to plaintiff in a correct form we are required to presume that the error resulted through negligence. *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; S. C., 16 Am. Rep. 437; Wharton on Negligence, 766, and authorities cited.

Sweatland v. Ill. & M. Tel. Co., 27 Iowa, 435; S. C., 1 Am. Rep. 285, does not support the position of defendant. Under the contract sued upon in that case, the defendant's liability was restricted. It was held that, under such restriction, the defendant was liable for want of ordinary care and the burden of proving negligence was upon the plaintiff.

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III. Another view of the case, in our opinion, removes all doubt of the liability of defendant under the evidence found in the record. The contract between the parties was not for the sending of messages but that defendant was to furnish plaintiff with daily reports of the grain market at Chicago and New York. These reports were not sent by a correspondent of plaintiff but, as we understand the record, were to be procured and sent by defendant from Grinnell or from some other place on their line. In this view of the case defendant was liable, even though the reports sent were incorrect, for it was charged with the duty of procuring them and liable consequently for any errors which destroyed their character as true reports. In undertaking to furnish reports of the market they bound themselves to furnish *true* reports, and they would be liable for sending those which would tend to deceive plaintiff, and thus subject him to loss.

IV. Defendant's counsel urge that the finding of the court to the effect that "defendant's telegraph line was not in good, perfect working order," is not supported by the evidence. It may be conceded that this objection is well taken, yet it does not require the reversal of the case. The court correctly found, as we have seen, that the error in the report resulted from defendant's negligence. This would render it liable and sufficiently support the judgment. It was not necessary in order to entitle plaintiff to recover that in addition to defendant's negligence it should be shown that its line was not in good order.

If we should, therefore, conclude that this particular finding is in conflict with the evidence, we would not be required to reverse the judgment.

V. The objection of defendant, which we consider in the last place, is directed at the damages allowed by the court. It is claimed that, as plaintiff was engaged in buying grain at Steamboat Rock and gave defendant no notice that the market report furnished was intended to guide him in purchases of wheat in Chicago, he cannot recover as damages the loss which he sustained by reason of the error in the dispatch, in the purchase of the 5,000 bushels of wheat. Such damages, it is claimed, did not enter into the contemplation of the parties when the contract was made. There is nothing in the evidence upon the subject further than that plaintiff was a purchaser of grain at Steamboat Rock, and that he sold in Chicago. It also appears that he made contracts for the delivery of grain at that city at a future day. All of his transactions were based upon his information of the Chicago market, and that he might have speedy and accurate information, he entered into the contract sued upon. It is within the ordinary course of business for a dealer in grain to make

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contracts for future delivery, and to depend upon future purchases to enable him to fulfill his obligation. These purchases are made whenever the grain can be had at a price offering an inducement to the dealer, and such purchases are often made by business men of this State in Chicago to fill their contracts for delivery in that city. These facts, it will be presumed, entered into the contemplation of the parties to the contract in suit. The defendant, then, cannot claim that it is released from liability for the loss sustained by plaintiff on the ground of a want of notice of the transaction in which defendant used the information furnished by the report of the market. It appears to us that as defendant contracted to furnish reports of the Chicago grain market to plaintiff, it was sufficiently notified that plaintiff's transactions were to be in that market and there is no evidence raising a presumption that defendant was authorized to regard him as a seller only of grain there. These considerations dispose of the argument of defendant on this branch of the case.

VI. The damages awarded plaintiff appear to us to be no greater sum than will justly compensate him for the loss sustained. He was led to believe, by the dispatch delivered by defendant, the market value of wheat was \$1.21½ per bushel. Upon that information he ordered the purchase of wheat, and was compelled to pay \$1.50. He could have purchased within the time prescribed by his contract for the delivery of the wheat for even less than the price named in the false report upon which he acted. It was the cause of his paying 28½ cents more per bushel than he consented to pay, and 38 cents more than the price at which he could have purchased the grain within five days after its receipt. Certainly plaintiff suffered loss to the amount of the judgment through the fault of defendant. The District Court awarded him no more than compensation.

The foregoing discussion disposes of all questions raised in this case. The judgment is

Affirmed.

STATE V. BOOK.

(41 Iowa, 550.)

Criminal law — gambling — billiard-room.

The keeper of a billiard-room where parties with his knowledge play billiards with the understanding that the loser shall pay for the use of the table, is guilty of a violation of a statute against keeping a house resorted to for the purposes of gambling.

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INDICTMENT charging that the defendant, at a time and place stated, "kept, used, managed, and controlled a building, erection and place, resorted to by divers persons for the purpose of gambling at games of pin pool, cards, dice, and other games, for money, beer, cigars and other things of value, and the said Peter Book, within the building erection and place aforesaid, then and there suffered and permitted persons to play at games of pin pool, cards, dice, and other games, for money, beer, cigars, and other things of value, contrary to the statute," etc.

The defendant pleaded not guilty, and on a trial by a jury was convicted and adjudged to pay a fine of \$50 and costs, from which judgment he appeals.

Ginton, Hart & Brewer, for appellant.

M. E. Cutts, Attorney-General, for the State.

MILLER, C. J. The evidence shows that the defendant kept a place, as charged in the indictment, where persons resorted for the purpose of playing games of billiards, pin pool, etc., and where the defendant also kept cigars and drinks for sale; that it was the custom or habit of persons resorting to this place to play billiards and pin pool, "and the losing party to pay for the game;" the price of pin pool was five cents a cue, and billiards twenty cents a game. Sometimes, too, the man that got beat would treat. The evidence also leaves no doubt of the fact that the defendant knew that games of billiards and pin pool were played in the manner the evidence shows; in other words, that it was usual, in fact universal, for them to play those games with the agreement or understanding that the loser should pay for the games, and that they were in fact so played.

I. The court, among other things, charged the jury that if they found the above enumerated facts they would be authorized to find the defendant guilty under the indictment.

It is urged by counsel for appellant that these facts do not constitute the crime charged in the indictment. In other words, that playing the game of "pin pool" with the agreement that the losing party shall pay for the game, and he does so in fact, is not gambling, and, therefore, to suffer such playing in a house or place under the control or care of the defendant does not constitute the crime charged.

The statute provides that to "play at any game for any sum of money or other property of any value" is gambling. Code, § 4028. Now, it is clearly shown and not disputed that the defendant kept certain tables on which divers persons were in the habit of playing at what is

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called the game of "pin pool." That this play is a "game" there is no dispute, and there is no controversy about the fact that for the use of the tables and other instruments of the game, the defendant charged and required the players to pay a certain sum of money for each cue (whatever that is). When, therefore, two or more persons played this game they became jointly or severally bound to pay the sum or sums of money chargeable therefor. It is plain that if they play the game or games in order to determine which of the players shall pay the entire sum or sums which they would be jointly or severally bound to pay, they play for the sum each one would be bound to pay, and it does not change the matter that they play the game in advance of paying therefor. The principle is the same as if the money had been staked or put up before the game was played. It is gambling in the one case as well as in the other. Nor is it any less gambling that the sum of money played for is small. To "play at *any* game for *any* sum of money," however small, comes within the statute.

This view is sustained by *The State v. Leighton*, 3 Foster (N. H.), 167, and *Ward v. The State of Ohio*, 17 Ohio St. 32, both cases being precisely in point. In the former the learned judge delivering the opinion of the court says: "The defendants made a profit from the use of the billiard tables; for the 'hire' of them they were paid a shilling a game. The persons who resorted there played for the hire. In substance they played for a shilling a game. The loser paid and the winner received the sum. By an understanding among the players, the money was to be applied toward defraying the expenses of the tables; but still it was money won at play and upon the chance of the play." The same doctrine is held also in the case last cited.

In *Harbaugh v. The People, etc.*, 40 Ill. 294, and *Blewitt v. The State of Mississippi*, 34 Miss. 606, a contrary doctrine is held under the statutes of those States. Under our statute, we deem the former the correct view, and that any different construction would not be warranted.

The judgment of the District Court will be affirmed.

State v. Eggesht.

STATE V. EGGESHT

(41 Iowa, 574.)

Criminal law — when several acts constitute one offense — former conviction.

The defendant delivered at the same time and by the same act, to the teller of a bank, four forged checks which purported to have been drawn by four different parties. *Held*, that this constituted but one offense of uttering forged checks, and that a conviction for uttering one of the checks was a bar to a conviction for uttering the others.

INDICTMENT for uttering a forged check or order. The agreed statement submitted showed the following facts :

“ On the 19th day of February, 1874, the grand jury of Scott county, Iowa, returned into the District Court of said county eight indictments, in due form of law, and each indictment charging the defendant, T. S. Eggesht, with uttering and publishing as true a false order with intent to defraud ; and, also, eight other indictments for forgery. The orders were forged, and were uttered by the defendant as charged in the indictment, with intent to defraud, as follows :

In the afternoon of February 14, 1874, defendant presented to the Davenport National Bank, of Davenport, Iowa, a body duly incorporated, and with which T. S. Eggesht & Co. had an account, four orders or checks, described as follows :

One for \$1,760.55, purporting to be drawn by H. Koehler & Lange upon the Citizens' National Bank of Davenport, Iowa.

One for \$1,550.51, purporting to be drawn by Krack & Wohlenberg upon the Citizens' National Bank of Davenport, Iowa.

One for \$830.50, purporting to be drawn by H. P. Beattie upon the First National Bank of Davenport, Iowa.

And one for \$1,460.10, purporting to be drawn by Dow, Gilman & Hancock upon the First National Bank of Davenport, Iowa.

All the foregoing described checks were drawn payable to the order of T. S. Eggesht & Co., and were indorsed by defendant by writing the name of the firm upon the back of said checks.

Said checks, together with a deposit-check for the sum of \$5,601.66 (the total amount of the four checks), were placed together in one package and placed in an ordinary bank or account-book, which said bank furnished defendant and other depositors of said bank, and in which credits to depositors were placed. That after being so placed in said book and the book closed, said book, in which said checks were inclosed, was handed to the teller of said bank by defendant, who took them out

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of said deposit-book, and after examining them placed the amount of the same to the credit of said T. S. Eggesht & Co., by entering the amount thereof in said bank-book.

After the credit was so given the defendant presented a check upon said Davenport National Bank for the sum of \$4,500, signed by T. S. Eggesht & Co., and received from said bank the amount thereof in currency.

Near the same time, on the same day, at the First National Bank of Davenport, Iowa, an incorporated body, and with which T. S. Eggesht & Co. had an account, the defendant presented four checks which were exact duplicates of the four presented to the Davenport National Bank, and above described, which, with a deposit-check, he presented in the same manner as described above, by handing them in one package to the teller, inclosed in the bank-book of the First National Bank, which the teller examined but refused to pass to the credit of the defendant or the firm of T. S. Eggesht & Co. until inquiry was made regarding them. It was ascertained that they were forgeries, and they never were credited to defendant or said firm.

At the October term of the District Court, 1874, the defendant was put upon trial for uttering at the Davenport National Bank the check purporting to be drawn by Krack & Wohlenberg, was found guilty and sentenced to the penitentiary for the term of two and one-half years. Said case is designated upon the records of the court as number 12,730.

After said conviction the case designated upon the docket as number 12,732 was called for trial, the indictment in said case charging defendant with uttering the check purporting to be drawn by H. Koehler & Lange, when defendant interposed a plea of former conviction, setting forth the conviction in the case numbered 12,730, and alleging that the offense upon which he was charged, tried and convicted, is the same offense as that charged in the present indictment; that the checks described in each indictment were uttered at the same time, in the same manner, in the same parcel, and under the same circumstances, at the Davenport National Bank, and that but one crime was committed thereby.

To this plea the State interposed the following demurrers:

1st. "Because the check for the uttering of which defendant had been convicted is different from that on which he now stands indicted."

2d. "Because it is shown from the record that the crime for which defendant has been convicted is a different one from the one for which he is now indicted."

The court sustained the demurrer, and the defendant was tried, found guilty, and sentenced to the penitentiary for two and one-half years.

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At the same term of court defendant was put upon his trial in cause numbered 12,725, for uttering at the First National Bank the check purporting to be drawn by Dow, Gilman & Hancock for \$1,460.10, was found guilty, and sentenced to the penitentiary for the term of two and one-half years.

After the conviction last above referred to, the cause numbered 12,728 was called for trial. The indictment in that case charging the uttering of the check purporting to be drawn by H. Koehler & Lange."

To this defendant interposed a like plea of former conviction, to which a similar demurrer was sustained, and defendant was tried, convicted and sentenced to the penitentiary for two and one-half years. Defendant appeals.

W. A. Foster, for appellant. But one crime is committed by uttering a number of forged checks at the same time to the same party. Each check, although purporting to be drawn by different parties, cannot be made the basis of a distinct offense. 1 Bish. C. L., § 985; *People v. Van Kuren*, 5 Park. Cr. 66; *State v. Benham*, 7 Conn. 414; *Fiddler v. State*, 7 Humph. 508; *Roberts v. State*, 14 Ga. 8; *State v. Nelson*, 29 Me. 329.

M. E. Cutts, Attorney-General, for the State. The stealing of the goods of several parties at the same time constitutes as many distinct offenses as there are distinct owners of the goods stolen, and a conviction for one is no bar to a subsequent conviction for the other offenses. *United States v. Beerman*, 5 Cranch's C. C. 412; *Com. v. Andrews*, 2 Mass. 409; *Regina v. Brettell*, 1 Carr. & Mar. 609; *State v. Thurston*, 2 McMullan, 382; *Rex v. Champneys*, 2 Moody & Rob. 26.

DAY, J. Whether certain criminal acts constitute one crime or more must depend upon the nature and circumstances of the acts themselves.

When the defendant uttered, at the Davenport National Bank, four forged checks, the character of his act became fixed. He either committed one crime, or he committed four. It is not competent for the State, at its election, by the form of the indictment, to give to defendant's act the quality of one crime or of four at pleasure. The act partakes wholly of the one character or wholly of the other.

We think the decided weight of reason and of authority supports the position that when defendant by one muscular action and one volition passed to the bank in question four forged checks, and procured them to be placed to his credit, he committed one crime, and not four

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Cases involving analogous principles, but none ruling the precise point involved, have been cited by the attorney-general.

In *Regina v. Brettel*, 1 Carr. & Mar. 609, cited by appellee, it was held that where the defendant stole two pigs at one time, and was convicted and punished for stealing one, such conviction could not be pleaded in bar to a subsequent prosecution for stealing the other pig.

The same doctrine is held in other cases. See 1 Wharton's Criminal Law, § 565, note x.

But the decided weight of authority seems to be opposed to this view. See *Lorton v. State*, 7 Mo. 55; *State v. Nelson*, 29 Me. 329; *State v. Williams*, 10 Humph. 101; *State v. Morphine*, 37 Mo. 373; *Jackson v. State*, 14 Ind. 327.

In the case of *United States v. Beerman*, 5 Cranch's C. C. 414, also cited by appellee, it was held that stealing goods of several persons at one time constituted as many distinct offenses as there were distinct owners of the goods stolen, and that such offenses might be charged in as many distinct indictments. See, also, *State v. Thurston*, 2 McMullan, 382. Directly opposed to this doctrine is *Lorton v. State*, 7 Mo. 55.

It seems impossible to maintain the doctrine of the former cases upon principle. If the stealing of various articles owned by different individuals constitutes as many distinct offenses as there are owners, then they cannot be united as one offense in the indictment. If one should at the same time, and as one act, steal two watches, each of the value of fifteen dollars, and owned by different persons, and another person should steal in the same manner two articles of like value owned by one person, it would be difficult to give a reason satisfactory to the legal mind why one should expiate his offense with a fine of two hundred dollars or imprisonment in the county jail for sixty days, whilst the other should be sent to the penitentiary for the period of five years.

If A should at one time, and as one act, hand to a merchant four counterfeit bills, each of the denomination of five dollars, and have the amount passed to his credit, and B should in like manner pass one bill of the denomination of twenty dollars, we would much doubt whether the "perfection of human reason" would be evinced in sending B to the penitentiary ten years for one crime, and A forty years for four crimes.

Or, suppose that the defendant, instead of passing to the bank four checks, amounting to \$5,000, and procuring credit thereon had paid over in a similar manner the sum of \$5,000 in bills, each of the denomination of five dollars, would it be claimed that he had committed one thousand criminal offenses, each of which might be punished by imprisonment for the term of ten years? Yet there can be no difference in principle between

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the passing of a counterfeit bank bill and the uttering of a forged check or draft. That the defendant, at each of the banks in question, committed but one offense, is well sustained by authority. See *The People v. Van Keuren*, 5 Park. Cr. 66; *State v. Benham*, 7 Conn. 414.

It is urged by the appellee that if the State had failed to prove the forgery of the check described in the first indictment tried, there would have been an acquittal, and that it is a dangerous rule to allow such acquittal to be pleaded in bar to a subsequent prosecution for uttering another check, since it would thereby be placed in the power of the defendant to secure a trial upon the indictment under which he knows no conviction can be had, and then plead the judgment of acquittal as a bar to the other indictments. But the State can and should prevent the happening of any such contingency, by charging the uttering of all the checks offered at the same time, in one indictment and as one offense. When this is done, proof that any one of the checks was known to be forgery, will support the indictment.

In *The People v. Van Keuren*, *supra*, a party who had a roll of counterfeit bills in his possession was indicted for having one counterfeit bill in his possession, with intent to utter as true, and was acquitted of the charge, and it was held the acquittal was a bar to a prosecution on account of the other bills.

The court erred in sustaining the demurrers to the defendant's pleas.

Reversed.

WEARE V. VAN METER

(42 Iowa, 128.)

Tenants-in-common — purchase by one tenant at tax sale.

Where one tenant-in-common purchases the land held by himself and his cotenants, at a tax sale, he will be regarded as holding the title in trust for his cotenants unless they refuse to contribute.

ACTION of partition. The defendants claimed to hold the sole and entire title to the land in question, and denied plaintiff's interest. The opinion states the facts.

The court below found for the defendants and dismissed the petition. Plaintiff appealed.

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Fraer & Burnham & G. M. Gilchrist, for appellant.*R. St. Clair & J. Van Meter*, for appellee.

BECK, J. The plaintiff claims title to an undivided interest in the land under a sheriff's sale and deed based upon a judgment against the mother of the defendants, who was a tenant-in-common with plaintiff, and holds title to an undivided two-thirds of the land. Prior to this sale the defendant, Henry Van Meter, became a purchaser of all the lands at a sale for taxes accruing after he acquired an interest in the lands, and received a tax deed upon such sale. He now claims that this tax deed divests plaintiff of all interest in the land.

The question presented for decision in the case is this : May a tenant-in-common, by acquiring a tax title covering all the land held by himself and cotenants, defeat the title of his cotenants to their undivided interest? We think not, and base our conclusion upon the principles which we proceed to announce.

A tenant-in-common holds a several interest in the lands, which is so far identical with his cotenants' interest that, in all matters affecting the estate, he will be regarded as acting for them as well as himself. He cannot, therefore, purchase an outstanding adverse title and set it up against his cotenants, if they are willing to reimburse him, *pro rata*, for the money by him so expended. He will be regarded as holding the title he thus acquires in trust for his cotenants until the presumption is repelled by their refusal to contribute in payment of his outlays. *Lee et al. v. Fox*, 6 Dana, 172; *Venable et al. v. Beauchamp*, 3 id. 321; *Sneed's Heirs et al. v. Atherton*, 6 id. 276; *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Flagg v. Mann*, 2 Sumner, 486; *Coleman v. Coleman*, 3 Dana, 398.

It is not shown that the plaintiff in this case ever refused to contribute to the expense incurred by defendants in the purchase of the tax title. He could have at any time enforced contribution from them. *Sears v. Sellow*, 28 Iowa, 501.

It has been held that the title acquired by a tenant in common under a purchase of the land at a tax sale is fraudulent and void as against his cotenants. *Browne v. Hogle et al.*, 30 Ill. 119; *Piatt v. St. Clair's Heirs*, 6 Ohio, 227; *Douglass v. Dangerfield*, 10 id. 152; *Chickering et al. v. Faile et al.*, 38 Ill. 342; *Burhans et al. v. Van Zandt et al.*, 7 N. Y. 523; *Moore v. Tilman*, 44 Ill. 367; *Frye v. Bank of Illinois*, 11 id. 367.

Under the foregoing principles and authorities defendant must be regarded as the trustee of his cotenants, holding the tax title for their

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benefit. The equitable interest held by the cotenants under the tax title of defendant could properly be ascertained in this partition action: indeed this is the appropriate proceeding for that purpose. When ascertained the land would be partitioned among the various parties as their respective interests, determined by their cotenancy existing before the acquisition of the tax title, demanded.

The position of defendant's counsel that defendant holds the record or proper title and plaintiff, if he have any rights to the land, must invoke the aid of equity for permission to redeem from the tax sale, is answered by the consideration of the doctrines above announced. •

The judgment of the Circuit Court is reversed and the cause is remanded for proceedings in accord with this opinion.

Reversed.

MEWHIRTER V. HATTEN.

(42 Iowa, 288.)

Husband and wife — action by wife for personal injuries — concurrent right of action by husband.

By statute a married woman was alone authorized to bring action for an injury to her person. *Held*, that the husband had also a right of action for consequential injury to himself resulting from an injury to his wife, in being deprived thereby of her labor and service.*

ACTION against a physician and surgeon for malpractice in the treatment of plaintiff's wife whereby she was alleged to have sustained serious injury and to have been permanently disabled in body.

The petition among other things states that the plaintiff has been compelled to pay out and expend large sums of money in caring for and doctoring his wife, and has been, and will during her natural life, owing to the injuries caused by the negligence of the defendant, be deprived of the physical labor and assistance of his said wife to the great damage of the plaintiff, etc.

The defendant filed a motion to strike out of the petition the statement that plaintiff had been, and would, during the life of his wife, be deprived of her labor and assistance, as being immaterial. The court sustained the motion, and the plaintiff standing upon his pleading, the court rendered judgment for defendant for costs. Plaintiff appeals.

* See *Hunt v. Town of Winfield*, 17 Am. Rep. 482, and *Smith v. St. Joseph*, id. 660.

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Mon'gomery & Scott, for appellant.

C. E. Richards and *Brown & Churchill*, for appellee.

MILLER, C. J. The question presented for decision is, whether a married man is entitled to the personal labor and assistance of his wife to any extent whatever, so as to be entitled to maintain an action against one who, by injuries committed upon her, deprives him of such labor and assistance.

By the common law the husband was entitled to the labor and earnings of the wife and to all property and money acquired as the fruits of such labor or earnings. *Duncan v. Rosselle et al.*, 15 Iowa, 501; *Laing v. Cunningham*, 17 id. 510. The common law, however, has in this respect been modified by our statutes. How far the modification extends we will proceed to inquire. The Code provides as follows :

"Section 2202. A married woman may own in her own right real and personal property acquired by descent, gift, or purchase, and manage, sell, convey, and devise the same by will, to the same extent and in the same manner that the husband can property belonging to him."

"Section 2211. A wife may receive the wages of her personal labor and maintain an action therefor in her own name and hold the same in her own right; and she may prosecute and defend all actions at law and in equity for the preservation and protection of her rights and property, as if unmarried."

"Section 2212. Neither husband nor wife is liable for the debts or liabilities of the other incurred before marriage, and, except as herein otherwise declared, they are not liable for the separate debts of each other; nor are the wages, earnings, or property of either, nor is the rent or income of such property liable for the separate debts of the other."

"Section 2562. A married woman may in all cases sue and be sued without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment in such action shall be enforced by or against her as if she were a single woman."

We have held under the Revision of 1860, which contained substantially the above provisions, that a married woman may maintain an action in her own name for an injury to her person or reputation; that for such injury a right of action accrues to her which is her own separate property, and that in an action for such injury her husband cannot be joined. *Musselman v. Gallagher*, 32 Iowa, 383; *Pancoast v. Burnell*, id. 394. Appellee, therefore, insists that since the husband cannot be joined

in an action with the wife for the recovery of her property, he has no right to sue separately for an injury to her, which it is claimed is exclusively the property of the wife, and it is claimed also that such is the effect of the holding in the cases referred to. It is also insisted by counsel for appellee that under section 2211 of the Code, above set out, the husband is in no degree entitled to, and has no claim upon, the personal labor or assistance of the wife; that this is her own separate property, and that he cannot therefore join with her in an action therefor.

In the case of *Musselman v. Galligher*, *supra*, the language of the opinion is clear and explicit that, in the right of action which accrues to the wife for the direct injury to her, the husband has no interest, that she alone must sue thereon, but that this does not preclude the husband from maintaining an action for the consequential injuries suffered by him, nor that these are merged in the right of action which accrues to the wife. If the husband be entitled to the assistance or labor of the wife in any degree, then to deprive him of such assistance or labor by a direct injury to the wife, which renders her incapable of rendering such assistance or labor, is an injury to the husband for which he may maintain his action. This brings us to consider and determine whether or not, under section 2211 above, the husband is entitled to the labor or assistance of his wife. That section provides that the "wife may receive the wages of her personal labor and maintain an action therefor in her own name, and hold the same in her own right." We think that the terms, "wages of her personal labor," as here used, refer to cases where the wife is employed to some extent in performing labor or services for others than her husband, or where she is carrying on some business on her own behalf; such, for instance, as dressmaking, or the millinery business or school-teaching. In a word, she is entitled to the wages for her personal labor or services performed for others, but her husband is entitled to her labor and assistance in the discharge of those duties and obligations which arise out of the married relation. We feel very clear that the legislature did not intend by this section of the statute to release and discharge the wife from her common-law and scriptural obligation and duty to be a "help-meet" to her husband. If such a construction were to be placed upon the statute, then the wife would have a right of action against the husband for any domestic service or assistance rendered by her as his wife. For her assistance in the care, nurture and training of his children, she could bring her action for compensation. She would be under no obligation to superintend or look after any of the affairs of the household unless her husband paid her wages for so doing. Certainly, such consequences were not intended by

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the legislature, and we cannot so hold in the absence of positive and explicit legislation.

In the second case of *Grant v. Green*, 41 Iowa, 86, which was an action by a wife against the administrator of her deceased husband's estate, for services rendered in taking care of her husband in his life-time during a period of his insanity, it was held that she could not recover for such services, notwithstanding she had been employed by the guardian of her insane husband to perform them. It is there held that it is the right and duty of husband and wife to protect and care for each other in case of sickness or insanity. These and like services arising out of the married relation are to be rendered in conformity with the mutual obligations which have been assumed in entering into that relation, and are not such as have "*wages*" attached thereto, within the meaning of the statute. When the wife performs labor or services for others for which wages accrue, such wages are her own separate property, but for labor performed and assistance rendered in the discharge of her domestic duties as a wife no wages, in the proper meaning of that term, attach or follow. Both husband and wife have in their marriage vows bound themselves to the discharge of their respective duties toward each other, for which no wages as such are due. These duties being mutual, their discharge by the parties constitute the only compensation contemplated by law.

In *Peters v. Peters*, decided at the present term, it was held that the wife could not maintain an action against her husband for assault and battery. It is there said that, "whilst it must be admitted that very radical changes have been made in the relation of husband and wife, still it seems to us that these changes do not yet reach to the extent of allowing either husband or wife to sue the other for a personal injury committed during coverture." It seems to us, also, that these changes have not transformed the wife into a hired servant, or established the law to be that the husband, when prostrated on a bed of sickness, will not be entitled to the tender care and watchfulness of his wife, unless he has the ability and expects to pay her wages therefor. These duties are mutual and reciprocal and essential to the harmony of the marital relation. To abrogate these duties, or remove the mutual obligations to perform them, would be to dissolve that relation and establish that of master and servant.

We are of opinion that the court erred in sustaining the defendant's motion to strike out, and the judgment must be

Reversed.

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(42 Iowa, 308.)

Municipal corporation — liability of, for insufficient culvert.

In an action against a city to recover damages for injuries occasioned to plaintiff's property by reason of an insufficient culvert, *held*, (1) that the city's liability was not altered by the fact that the culvert had been paid for by the county ; (2) that the city was not liable if it employed a competent engineer to construct the culvert even though he misjudged as to the capacity required ; (3) that the city was bound to exercise reasonable care, judgment and skill in the construction of the culvert ; and (4) that if plaintiff could have protected his property at alight expense he could not recover beyond what such protection would have cost. (*See note, p. 626.*)

ACTION for damages.

The petition in substance alleges that in the year 1871 the defendant, a duly incorporated city, constructed a culvert on Case street, near the plaintiff's premises, in such a careless and improper manner that it obstructed the flow of a natural stream of water running near plaintiff's premises, and caused large quantities of water to be discharged thereon, damaging and depreciating his property to the extent of \$500.

The answer admits the making of the culvert described, but denies that it was constructed in a careless manner, and denies the other allegations of the petition.

The answer further alleges that, in 1871, in the judgment of the proper officers of defendant, it became necessary to establish the grade of Case street, and to construct a culvert across a drain for surface water flowing over that part of said street, near plaintiff's premises. That said grade and culvert were, in the judgment of the constituted authorities, established and built in a proper manner, and that if the property of plaintiff has been injured, it was without the fault or wrong of defendant, and on account of his own fault in not bringing his lot to a proper grade.

Afterward the defendant filed an amendment to its answer as follows :
“ That the culvert referred to in plaintiff's petition was built under an appropriation made by the board of supervisors of Scott county, Iowa and was alone paid for by the county of Scott. That said Scott county, through its proper officers, directed the building of said culvert, and appropriated the money therefor, and that said defendant, or its engineers, in building said culvert acted for and as the agent of said Scott county, and that said culvert was not in fact built or paid for by said defendant, but that said defendant acted alone for said county.

A demurrer to this amendment was sustained.

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The evidence shows that the city of Davenport projected one of its streets across a ravine with banks on each side four or five feet high, and for the purpose of allowing the passage of the water accumulating in the ravine, the city constructed the culvert in question, which is sixty feet long, and has a capacity of three by six feet. This ravine drains a large surface; it has always been the natural place for the surface water to run, and after rains the water flows through it for several days. It empties into the Mississippi river a few hundred feet south of the culvert. The ravine originally ran close to the edge of plaintiff's lot, but when the culvert was constructed the channel of the ravine was removed about thirty feet, improving the appearance of the lot. A portion of plaintiff's lot is about eighteen inches below the established grade of the city. The culvert is not sufficient to carry off the water that comes down in a heavy rain. The engineer of the city who drew the plans for the culvert believed it would be large enough to carry off all the water that would come down the ravine.

There was evidence tending to show that if plaintiff's lot was brought to grade, a wall or rip-rap sufficient to protect it from overflow and damage could be constructed for \$25.

There was a jury trial and a verdict and judgment for plaintiff for \$850. Defendant appeals.

H. M. Martin, for appellant.

Rose & Benson, for appellee.

DAY, J. 1. There was no error in sustaining the demurrer to the amendment to defendant's answer. It is not denied that the culvert in question is within the corporate limits of the city, and was built under the direction of the officers of, and belongs to the city. The mere fact that the board of supervisors of Scott county appropriated the money to pay for the structure does not exonerate the defendant from liability for negligence or carelessness in its construction. The owner of premises is liable for any nuisance erected thereon, upon the ground that he is bound to control and use his property in such manner as not to produce injury to others. *The Mayor of New York v. Bailey*, 2 Denio, 433.

II. The defendant asked the court to instruct the jury as follows:

2. "In constructing the culvert the defendant was only required to use reasonable care; such care as a prudent man would use under like circumstances in reference to his own property. If you, therefore, find that the city had an engineer who was competent to take charge of such work, and that the size of the culvert was left to him and that he honestly be-

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lieved, in drafting the plans for the culvert, that he was making it large enough, then, even if he were mistaken, the defendant is not responsible for his mistake, and the plaintiff cannot recover." The refusal of the court to give this instruction is assigned as error.

Taken together it announces a correct rule of law and should have been given. The city cannot be held liable unless for some neglect or omission of duty or negligence in its performance. It is not claimed that the culvert was out of repair, nor that it was in any way defective in construction, except that it was too small to admit of the passage of the surface water which accumulated in the ravine in consequence of unusually heavy showers. As the city must act through the agency of others, it was its duty to select a competent engineer. When such selection is made, the city has in that regard discharged its duty, and no direct negligence or omission is attributable to it. If a competent engineer acts in good faith in drafting the plans of a culvert, and honestly believes that he is making it large enough to accomplish the desired purpose, then no negligence of the servant is attributable to the principals.

If he is sufficiently competent and makes a mistake after the honest exercise of his best judgment, it is such mistake as is inseparable from human action. The making of such mistake cannot be attributed to negligence, for negligence is the failure to exercise ordinary care. If, then, the city can be held responsible for the consequences of such mistakes, it is bound at its peril to secure what is impossible, absolute perfection in its servants and agents.

In *The Rochester White Lead Company v. The City of Rochester*, 8 N. Y. 463, the defendant was held liable for injuries resulting from an insufficient culvert built for the purpose of conducting the water of a small natural stream, which had previously been the outlet through which the surface water of a portion of the city had been carried off, and which, because of its want of capacity and the unskillfulness of its construction, failed to discharge the waters which accumulated by a freshet, so that they were set back upon the property of plaintiff. But in that case it was shown that the engineer was incompetent and the culvert was improperly constructed.

III. It is urged that the defendant can in no event be held liable for the want of capacity of the culvert, and the court was asked in substance so to instruct the jury. It is claimed that, to decide the kind and capacity of a culvert is a judicial act, and that an error in judgment is in the nature of a judicial error for which the corporation cannot be held liable.

We have already seen that, for a mere mistake, notwithstanding the exercise of reasonable prudence and care, and the possession and exercise

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of competent skill on the part of its agents, the city is not liable. But this position of defendant goes much further and discharges the city absolutely from liability because of the alleged judicial nature of the act it is called upon to perform, notwithstanding the failure to possess and employ reasonable judgment and skill.

In support of this view, counsel cite *Mills v. The City of Brooklyn*, 32 N. Y. 489. In that case it was held that the city was not responsible for a want of judgment in devising a system of sewerage; and that the duty was of a judicial nature, requiring deliberation and judgment. In that case it was laid down as a very clear proposition that if no sewer had been constructed at the locality referred to, an action would not lie against the corporation, and it was said that the plaintiff's premises were in no worse condition from the construction of an insufficient sewer than if none had been made.

This case involves different principles. By projecting its street across the ravine the defendant rendered necessary the construction of a culvert to admit of the discharge of accumulating surface water. Before the street was extended the water in this ravine passed freely and unobstructedly and without damage to plaintiff's property. As the improvement made by the city created a necessity for a culvert, which the city could not neglect to construct without being derelict in its duty, it was incumbent upon it to exercise reasonable care, judgment and skill in its construction. *Ellis v. Iowa City*, 29 Iowa, 229; *City of McGregor v. Boyle*, 34 id. 268.

IV. There was evidence tending to show that if plaintiff had raised his lot to grade, a wall or rip rap sufficient for its protection against damage could have been built for twenty-five dollars. The defendant asked the court to instruct as follows: "The law makes it the duty of all persons to protect their own property from damages, if they can do so by ordinary efforts, and they can charge the delinquent party for such expense and efforts only. Hence, the court instruct you that if you find that the plaintiff at a reasonable expense could have protected his property by building what the witnesses call a rip rap or wall, and he has failed to do so, then all he can recover as damages will be the cost of such rip rap or wall." The refusal to give this instruction is assigned as error. That it should have been given, see *Simpson v. Simpson*, 84 Iowa, 568.

V. The court in substance instructed the jury that if plaintiff was entitled to recover, the measure of his damages would be the difference in the value of the lot immediately before and immediately after the grading of the street and the construction of the culvert. This instruction

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is erroneous. The rule announced by the court is the proper one when the act complained of takes a part of or effects a change in the realty itself, which is the subject of controversy. In this case no part of the lot was taken, nor was any change wrought upon it. The ravine was removed thirty feet from the lot, which all the testimony shows greatly improved its appearance. The only detriment which the lot sustains is in its liability to overflow from unusually heavy rains. The true measure of damage is the injury which the lot, buildings and other property of plaintiff sustains from the successive overflows when they occur, unless it should appear that by reasonable expenditure and precaution he could have guarded against injury.

VI. It is urged that the instructions are not excepted to in such manner that the errors assigned upon them can be reviewed. That case establishes the rule which applies under section 2789 of the Code, where the exceptions are not taken at the time the instructions are given, but within three days after verdict. The abstract in this case shows that the instructions complained of were excepted to at the time they were given. The exception is, therefore, governed by section 2787 of the Code, which provides that it may be without any stated reason therefor.

The foregoing discussion presents our views upon all the questions which will probably arise upon the re-trial. It follows that the judgment must be
Reversed.

NOTE.—As to duty of municipal corporations as to sewers, see *City of Cincinnati v. Penny*, 8 Am. Rep. 73; S. C., 21 Ohio St. 499; *Thurston v. St. Joseph*, 11 Am. Rep. 463; S. C., 51 Mo. 510; *Dixon v. Baker*, 16 Am. Rep. 591; S. C., 65 Ill. 518.

It is well settled that a municipal corporation is not responsible, in a private action, for not providing sewerage for every or for any part of the city or village. The duty of providing sewers is one requiring the exercise of deliberation, judgment and discretion, and is *judicial* in its nature. For misconduct or delinquency in the performance of judicial duties no action lies. But where a duty purely *ministerial* is violated or negligently performed, by a public body or officer, an injured party may have redress by action. The ordinance of a city corporation, directing the *construction* of a public improvement within the general scope of its powers, is a judicial act; but the *prosecution* of the work is ministerial in its character, and the corporation must see that it is done in a safe and skillful manner. The powers and duties of the common council in regard to the opening of sewers, etc., are discretionary; no liability arises for injuries caused by the *making* of an improvement, but for misconduct and unskillfulness in effecting the improvement, and for not keeping it in proper condition after it has been made, an action will lie.

Mills v. City of Brooklyn, 32 N. Y. 489; *Wilson v. Mayor, etc., of New York*, 1 Denio, 595. Having pointed out this distinction which is observed in the decisions, we will cite some of the cases which bear upon this subject.

An early and important case is *Rochester White Lead Co. v. The City of Rochester*, 3 N. Y. 463.

This was an action to recover damages for injuries caused to plaintiff's factory, by negligence in the construction of a culvert. The referee reported, that a natural

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stream, which was the outlet for the surface waters of four hundred acres of land, and having its source eighty rods west of State street, in the above city, crossed the street near plaintiff's factory. That by direction of the common council, a culvert was constructed to carry off all the water of the stream. That it was built by a non-professional engineer, and should have been one-third larger. That a flood occurred from rain and the melting of snow on the land drained, which produced an amount of water that the culvert was unable to pass, and the water set back on and injured plaintiff's premises. That the culvert was abundantly large for the natural stream, but was insufficient to carry off the water, when a great rain or melting of snow occurred. Under this state of facts the court held that the city was liable. They say: "A municipal corporation in the construction of its sewers, drains, etc., is bound to exercise that care and prudence which a discreet and cautious individual would use, if the whole loss or risk were to be his own." "The corporation having undertaken to build sewers in pursuance of the power conferred by charter, they were bound to exercise such skill in the construction, and to give such sufficiency of capacity to the drain, as that it should not become a nuisance to the property of those persons who resided in the neighborhood. Or in other words, having elected to act, under the power granted by charter, they must be held responsible for a complete and perfect execution. It is the duty of a municipal corporation to build a sewer so that it shall not become a nuisance to the neighborhood, as much as it is to avoid the same result, by keeping it in repair after it has been built."

Mayor, etc., of New York v. Furze, 3 Hill, 612. Error to the New York Common Pleas. Furze brought action alleging his occupancy of a building on Pearl street; that there were sewers and culverts in said street, designed to carry off the water, which the defendants allowed to become filled up and obstructed, by reason of which his premises were overflowed. The court below charged the jury that the defendants were bound to put and keep in repair the sewers, etc., and to see that they remained unobstructed so as to carry off the rain or water from the streets.

The plaintiff had judgment, which was affirmed.

Barton v. City of Syracuse, 36 N.Y. 54. This was an action on the case for negligence, in which defendant was charged with culpability, in omitting to keep a sewer in proper repair, and in suffering it to become filled with dirt and rubbish by reason of which the flow of the water was impeded, causing it to set back through the drain into plaintiff's cellar to his injury. The court held that "in the construction of sewers and in keeping them in repair, municipal corporations act ministerially, and are bound to exercise needful diligence, prudence and care."

Lewenthal v. The Mayor, etc., of New York, 61 Barb. 511. The plaintiff's house was overflowed by water flowing therein from the street sewer through the sewer connection. The plaintiff alleged that by reason of carelessness and unskillfulness in constructing the sewer, the same "was, and is of insufficient size and capacity to carry off the water and refuse which it was and is intended to do," and "is utterly insufficient and unfit to perform the work for which it was constructed." The overflow happened when there was a very heavy shower of rain. The court held: An action will lie against the corporation to recover the damages sustained by an individual by the bursting or overflowing of a sewer built under the direction of such corporation, and made of insufficient size and capacity to carry off the water, where the injury done was the direct consequence of the imperfect and insufficient construction of the sewer, of which the corporation had repeated notice.

Another question arises in the consideration of this subject, viz.: Must knowledge in, or notice to, the public authorities, of the defects which existed, be shown in order to fix this liability? This is not in all cases necessary. In *Barton v. City of Syracuse*, *supra*, BOOKES, J., remarks: "It is also insisted that the recovery is erroneous, because there was no proof of notice to the corporation of the needed repair, before the injury complained of occurred. Such notice was not, however, necessary in this case. The

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injury here resulted from an omission of duty—a neglect to do an act which it was incumbent on the defendant to do.”

McCarthy v. City of Syracuse, 46 N. Y. 194. The plaintiff's premises were flooded, and his goods were damaged, in consequence of the inability of a branch sewer to carry off the water which fell during a heavy rain, and which had become obstructed by the falling of a portion of the bricks of which the inlet was constructed, and the accumulation of mud and street filth. The point was raised that the city had no notice that the sewer needed repairing. The court held that mere absence of notice does not necessarily absolve the city from the charge of negligence. RAPALLO, J.: “Where the obstruction or dilapidation is an ordinary result of the use of the sewer which ought to be anticipated, and could be guarded against by occasional examination and cleansing, the omission to make such examination, and to keep the sewer clear, is a neglect of duty which renders the city liable.”

It is not necessary that the city should have *express notice* of defects, if ample time has elapsed to render them notorious. *Requa v. City of Rochester*, 45 N. Y. 129; *Walker v. City of Lockport*, 43 How. 866.

There is a third question of vast importance, and which arises very frequently. A corporation being the judge as to whether it will build sewers at all or not, is it also the sole judge as to the nature, dimensions, and capacity of the sewers which it has determined to build? Is a resolution of the common council, or the decision of a public officer, determining the size of the sewers which are to be built, a judicial act for neglect or delinquency in the performance of which a civil action is not maintainable?

In *McCarthy v. City of Syracuse*, *supra*, RAPALLO, J., says: “The entire omission to construct a sewer, or the failure to make it of sufficient size, has been held not to create a liability on the part of the city, for the reason that the duty of determining where sewers shall be located, and their dimensions, is, in its nature, judicial.” Judge RAPALLO cites in support of this view, *Mills v. City of Brooklyn*, 32 N. Y. 489. This language, however, is clearly *obiter*, for the question before the court was not of construction, but of obstruction.

In the *Mills* case the plaintiff's premises were injured by the inability of a sewer to carry off the water which ran toward it. The complaint alleged the erection of certain sewers by the city; that said sewers are, and always have been, insufficient to conduct, and carry away promptly, the water,” etc. DEXTER, Ch. J., says: The grievance of which the plaintiffs complain is, that sufficient sewerage to carry off the surface water from their lot and house has not been provided. A sewer of a certain capacity was built, but it was insufficient to carry off all the water which came down in a rain storm, and the plaintiffs' premises were, to a certain extent, unprotected. Their condition was certainly no worse than it would have been if no sewer at all had been constructed. So far as the one laid down operated it relieved the plaintiff's lot, but the relief was not adequate. If the defendants would have been liable if they had done nothing, they are of course liable for the insufficient character of the work which they constructed.” The judge clearly shows that no liability attaches for an omission to provide any sewerage, and then he holds that the corporation is the judge of the size of the sewers which it will build, and that they are not responsible if they prove insufficient. He remarks, “that it is a wise provision of the law that an action for damages does not lie for errors of judgment on the part of the agents of the public.” This language however, is used in a case where the error of judgment was not the cause of the injury.

In *Ashley v. City of Port Huron*, 15 Alb. L. J. 81, recently decided by the Supreme Court of Michigan, COLLER, J., examined with his usual ability the principle and the authorities relating to the liability of municipal corporations respecting sewers. The Court decided the following propositions:

A municipal corporation is not liable to individuals for damages sustained by them through its failure to exercise its legislative authority, or through any proper exercise thereof.

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But a municipal corporation is no more exempt from liability than an individual when that which it does necessarily or naturally results in the invasion of the freehold of a citizen.

Therefore, if a city so construct a sewer that the necessary result is that waters are collected by it and thrown upon the private premises of an individual to his injury, the city is responsible for such injury.

The flooding of private premises is just as much an appropriation of private property as would be the taking of an easement in it.

The opinion was as follows :

COOLEY, Ch. J. The action in this case was instituted to recover damages for an injury caused to the house of the plaintiff by the cutting of a sewer under the direction of the city authorities, and under city legislation the validity of which in point of form is not disputed ; the necessary result of cutting the sewer the plaintiff claims was to collect and throw large quantities of water upon his premises which otherwise would not have flowed upon them, and it is for an injury thereby caused that he sues. The evidence offered on the part of the plaintiff tended to establish the case he declared upon, but the court instructed the jury that though they should find the facts to be as the plaintiff claimed, they must still return a verdict for the defendant. The ground of this decision, as we understand it, was, that the city, in ordering the construction of the sewer and in constructing it, was acting in the exercise of its legislative and discretionary authority, and was consequently exempt from any liability to persons who might happen to be injured. That is the ground that is assumed by counsel for the city in this court, and it is supposed to be the ground on which the case was decided in the court below.

In *Pontiac v. Carter*, 32 Mich. 164, the question of the liability of a municipal corporation for an injury resulting from an exercise of its legislative powers was considered, and it was denied that any liability could arise so long as the corporation confined itself within the limits of its jurisdiction. That was a case of an incidental injury to property caused by the grading of a street. The plaintiff's premises were in no way invaded, but they were rendered less valuable by the grading, and there was this peculiar hardship in the case, that the injury was mainly or wholly owing to the fact that the plaintiff's dwelling had been erected with reference to a grade previously established and now changed. In the subsequent case of *City of Detroit v. Beckman*, 34 Mich. 125, the same doctrine was reaffirmed. That was a case of injury by being overturned in a street in consequence of what was claimed to be an insufficient covering of a sewer at a point where two streets crossed each other. It was counted upon as a case of negligence, but the negligence consisted only in this : that the city had failed to provide for covering the sewer at the crossing of a street for such a width as a proper regard for the safety of people passing along the street would require. If this case is found to be within the principle of the cases referred to, the ruling below must be sustained, and that, we think, is the only question we have to discuss.

The cases that bear upon the precise point now involved are numerous. In *Proprietors of Locks, etc., v. Lowell*, 7 Gray, 223, it was held that a city was liable in an action of tort for draining water through sewers and drains into a canal owned by a private corporation, thereby causing injury to the canal ; the conclusion being planted on the right of the corporation "to an unmolested enjoyment of the property." In *Franklin v. Fisk*, 13 Allen, 211, it is said by CHAPMAN, J., "when highways are established they are located by the public authorities with exactness, and the easement of the public, which consists of the right to make them safe and convenient for travelers, and to use them for public travel, does not extend beyond the limit of the location. A surveyor of highways who fells a tree upon the adjoining land *extra viam*, is a trespasser (citing *Elder v. Bemis*, 2 Metc. 299) ; neither his office nor the existence of the highway gives him any authority to meddle with the land outside the limits of the highway. In *Haskell v. New Bedford*, 108 Mass. 206, a city was held liable to the owner of a private

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dock into which to his injury the mud and filth from its sewer was discharged. In *Wilson v. New York*, 1 Denio, 595, on facts substantially like those in the present case, it was denied that plaintiff had any redress against the city. This decision was afterward questioned in the same court (*Week v. Brockport*, 18 N. Y. 161, 170, *note*), and in some other cases to which reference will be made further on. In *Lacour v. New York*, 3 Duer, 406, it was decided that a municipal corporation in the exercise of its authority over its property was as much bound to manage and use it so as to produce no injury to others as would be an individual owner, and that if the necessary result of an excavation in a public street was to injure the building on adjoining ground, the corporation must respond for such injury. In *Conrad v. Ithaca*, 16 N. Y. 158, a municipal corporation was held liable to one whose building was carried away in consequence of the negligent construction of a bridge by the corporation over a stream flowing through it. In *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, the city was made to respond in damages for flooding private premises with waters gathered in the sewer. This case is commented on in *Mills v. Brooklyn*, 32 N. Y. 489, and distinguished from one in which the injury complained of arose from the insufficiency of a sewer which was constructed in accordance with the plan determined upon. Obviously the complaint in that case was of the legislation itself, and of incidental injuries which it did not sufficiently provide against. The like injuries might result from a failure to construct any sewer whatever. But clearly no action could be sustained for a mere neglect to exercise a discretionary authority. Compare *Smith v. Mayor, etc.*, 6 N. Y. Sup. (T. & C.) 685; 4 Hun, 637; *Nims v. Mayor, etc.*, 59 N. Y. 500. Cases of flooding lands by neglect to keep sewers in repair, of which *Barton v. Syracuse*, 37 Barb. 292, and 36 N. Y. 51, is an instance, are passed by, inasmuch as it is not disputed by counsel for the defendant in this case, that for negligent injuries of that description the corporation would be responsible. Those cases are supposed by counsel to be distinguished from the one before us in this—that here the neglect complained of was only of a failure to exercise a legislative function, and thereby provide the means for carrying off the water which the sewer threw upon the plaintiff's premises. The distinction is that the obligation to establish open sewers is a legislative duty, while the obligation to keep them in repair is ministerial. But it is not strictly the failure to construct sewers to carry off the water that is complained of in this case; it is of the positive act of casting water upon the plaintiff's premises by the sewer already constructed.

An action like the one at bar was sustained in *Nevins v. Peoria*, 41 Ill. 502; *Aurora v. Gillett*, 56 id. 132; *Aurora v. Reed*, 57 id. 30; *Alton v. Hope*, 68 id. 167; *Jacksonville v. Lambert*, 62 id. 509. The same is true of *Pettingrew v. Evansville*, 26 Wis. 223, where DIXON, Ch. J., is at some pains to distinguish the case from one of merely incidental injuries. The case of *Vincennes v. Richards*, 23 Ind. 381, appears by the report to have turned on this distinction; and see *Cotes v. Davenport*, 9 Iowa, 227. The doctrine of the foregoing cases is approved by Judge DILLON in his treatise on Municipal Corporations, vol. 2, p. 799, *note*, where several Upper Canada cases are cited in its support. We refer also to *Merifield v. Worcester*, 110 Mass. 216, where the same distinction is somewhat considered by WELLS, J. In *St. Peter v. Dennison*, 58 N. Y. 416, the action was against a contractor with the State for the enlargement of the canal, who, in blasting rock, had caused an injury to the plaintiff while the latter was employed on other premises in the vicinity. The defendant claimed the same exemption which the State would have had under the same circumstances. Conceding that he might stand in the place of the State, the court held he was not entitled to protection. Even the State, it was said, could not intrude upon the lawful possession of a citizen. The case of incidental injuries, where the actor confined himself to the premises where he had a right to work, was considered and distinguished, and the clear liability of the defendant where the injury was accomplished by an actual invasion of another's premises, was affirmed.

It is very manifest from this reference to authorities that they recognize in municipal

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corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act, which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer, so constructed that the flooding must be a necessary result. The one is no more unjustifiable and no more an actionable wrong than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other. *Pumpel v. Green Bay Co.*, 13 Wall. 16; *Kismond v. Green Bay Co.*, 1 Wis. 316; *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504.

A like excess of jurisdiction appears when in the exercise of its powers a municipal corporation creates a nuisance to the injury of an individual. The doctrine of liability in such cases is familiar, and was acted upon in *Pennoyer v. Saginaw*, 8 Mich. 534.

The recent case of *Rowe v. Portsmouth*, decided by the Supreme Court of New Hampshire, 56 N. H. 291, is in accord with the views we have expressed.

It follows that the judgment must be reversed, with costs, and a new trial ordered.

 PEED V. MCKEE.

(42 Iowa, 689.)

Illegal contract — mortgage to compound felony.

Defendant's son having been guilty of the crime of embezzlement, defendant executed a mortgage in settlement of the amount embezzled in consideration of an agreement that the son should not be prosecuted. *Held*, that the consideration was illegal and the mortgage void.

ACTION to foreclose a mortgage executed by John and Jane McKee to secure certain promissory notes made by R. A. McKee. The petition, in addition to the foreclosure of the mortgage, asks judgment against the maker of the notes. A decree was entered dismissing the petition as to John and Jane McKee, and granting the relief asked against the other defendant. Plaintiff appeals.

James Embree and McHenry & Bowen, for appellant.

S. N. Lindley and Howe & Campbell, for appellees.

BECK, J. The answer of the mortgagors, John and Jane McKee, shows that they were sureties upon the notes secured by the mortgage, and the only consideration thereof was the compounding of a felony of which their co-defendant and son, R. A. McKee, had been guilty in em

bezzling a large sum of money ; that plaintiff had full knowledge of the crime, and for the protection of Stewart Goodrell, late United States Pension Agent, for whom plaintiff was acting as clerk, against loss on account of such embezzlement, the notes were executed under an agreement to compound and settle the crime, and in consideration thereof ; and that defendants were induced to execute the mortgage in suit, which covers their homestead, in consideration that their son and co-defendant should be relieved from all prosecutions on account of the crime of which he was charged, which was promised them by plaintiff, and held out as an inducement for the execution of the mortgage.

In our opinion the evidence before us sustains this defense. There is conflict upon this point of the case between the evidence of the witnesses of the respective parties, but in our judgment the fair preponderance is upon the side of defendants. There can be no doubt, we think, that defendants executed the mortgage for the purpose, and no other, of relieving their son from prosecution on account of his crime, and that the inducements in the nature of agreements and promises that he should not be prosecuted, led them to believe that he would be discharged from arrest under which he was then held, and no future steps would be taken to bring him to justice. We are well satisfied that plaintiff, the agent of Goodrell, who was the sufferer by the crime, if not a direct party to these agreements and promises, had full notice that they were made and that they were used as an inducement influencing defendants to execute the mortgage. Indeed the preponderance of the evidence is to the effect that he authorized the agreement to be made and sanctioned it after it was entered into.

The offense charged against defendant's son is and was at the time a felony. Rev., § 4244. The compounding of crimes of this character was punishable as a misdemeanor. Rev., § 4287. The promises and agreement under which defendants executed the mortgage were, therefore, in violation of law, and the instrument sued on, being based upon such promises, and a part of the unlawful agreement, will not be enforced in an action thereon, but will be held void. This conclusion is based upon doctrines too familiar to require the citation of authorities in their support.

In our opinion, therefore, the court below correctly ruled in holding that plaintiff could not recover upon the mortgage, and the decree dismissing the petition as against John and Jane McKee must be affirmed. No question arises in this court in regard to the judgment rendered on the note against R. A. McKee, as he does not appeal therefrom.

Affirmed.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

UNDERWOOD V. PEOPLE.

(82 Mich. 1.)

Constitutional law — verdict of jury — confinement of one acquitted on the ground of insanity — due process of law.

A statute provided that when the defense of insanity was set up upon the trial of an indictment for murder, etc., the jury should find specially whether the defendant was insane when the alleged crime was committed, and that if they acquitted on that ground the verdict should so state; that thereupon the court should sentence the defendant to confinement in the insane hospital until such time as the governor should discharge him; that such discharge should be granted whenever the prison inspectors should summon certain officers named, to examine the defendant and they should certify to the governor that he was no longer insane. *Held*, (1) that the jury had the constitutional right to give a general verdict, but that a special verdict was not unauthorized; (2) that the statute was unconstitutional in that it provided for depriving one of his liberty without due process of law.

INDICTMENT for murder. The opinion states the case.

Henry M. Cheever, for plaintiff in error.

Andrew J. Smith, Attorney-General, for the People.

CAMPBELL, J. Underwood brings error upon a judgment of the recorder's court of Detroit, whereby he was committed to the State prison insane hospital, as a person charged with murder and acquitted on the ground of insanity. He claims that the statute is invalid.

The statute in question, being act No. 168 of the Laws of 1873, en-
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titled "An act to provide for the custody and safe-keeping of persons who are tried for murder and other high crimes, and are acquitted by reason of insanity," provides in substance, that when the defense of insanity is set up in the cases provided for, the jury shall find specially whether the respondent was insane when the alleged crime was committed, and if acquitted on that ground the verdict shall so declare. In such case the court is to sentence him to confinement in the insane hospital of the State's prison until discharged in the manner pointed out. This can only be done when the prison inspectors summon (as they are empowered to do) the circuit judge of the circuit from which he is sent, and the medical superintendent of the Kalamazoo insane asylum, who are thereupon to examine into his condition, and if they certify he is not insane, the governor is to discharge him.

The finding of the jury is confined to the prisoner's condition at the time of the commission of the alleged criminal act. The indictment or information embraces, and can lawfully embrace, no issue except the prisoner's guilt as charged. The right of trial by jury is secured by constitutional provisions, and it would not be competent to make any substantial changes in its character. As suggested in *People v. Marion*, 29 Mich. 31, one of its substantial elements is the right of the jury to give a general verdict on the merits. Any collateral inquiry would be foreign to the issue. And as no insane person is subject to be put on trial, a finding that they had been trying such a person would be somewhat inconsistent with the notion that the trial could have been proper. The statute has avoided this error by confining their attention to the time of the offense; and while it is not competent to prevent an acquittal on a reasonable doubt of insanity, which would require a general verdict of not guilty, yet if the jury agree that the prisoner was insane, and that he would have been guilty if not so, they are undoubtedly at liberty, though they cannot be compelled, to find that fact specially. We cannot hold a special verdict or finding unauthorized, as the common law furnishes abundant precedents to the contrary. 1 Hale's P. C. 38.

The questions to be considered must be determined on the assumption that the verdict itself is authorized.

As insanity, when discovered, was held at common law to bar any further steps against a prisoner, at whatever stage of the proceedings, it was always competent to institute an inquiry into his condition. This investigation was sometimes had by the court alone, and sometimes by aid of a jury of inquest, which is regarded as the safest and most regular practice. See 1 Hale's P. C. 29 to 37, *passim*. There are some English statutes providing for most cases. In England the detention

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is during her Majesty's pleasure, whether on an acquittal by reason of insanity, or upon an inquest. See *Oxford's case*, 9 C. & P. 525; *Regina v. Goode*, 7 A. & E. 536; *Reg. v. Hodges*, 8 C. & P. 195; *Rex v. Pritchard*, 7 id. 303; *Rex v. Dyson*, id. 305. In *Oxford's case* the jury evidently had doubts whether he had actually done the act charged, and subsequent events showed that it was not likely he was dangerous, if insane at all, yet he was never discharged. Our compiled laws, long before this statute, authorized the judge to conduct such an inquiry, when the jury render such a verdict (C. L., § 7957), and this is a better course.

There can be no reason to doubt the propriety of making provision to secure to such unfortunate persons protection and care, in such a way as to prevent them injuring or being injured, if they are dangerous or in need of seclusion. The State has an ultimate guardianship over *non compos*, in cases where it is necessary.

But, inasmuch as such authority can only exist over those who are thus disqualified, the power of determining their condition is one of great importance, and one which especially involves judicial oversight. In this country, where all legislation must be within constitutional limits, and does not reach the full parliamentary range, private liberty can never be subjected to the mere discretion of any person. No one can be deprived of liberty without due process of law. Any involuntary control or seclusion is imprisonment, and that is only justifiable when enforced under valid laws. Every person has a right at all times to resort to the courts to have the legality of restraint determined, unless he is imprisoned under a valid judgment, under proceedings where he had a regular trial of hearing.

The present statute requires the respondent to be confined until he is discharged in the manner pointed out by the act. This requires, *first*, the action of the prison inspectors, for whose action the statute has made no direct provision, unless they choose; *second*, the summoning of a circuit judge from any part of the State to the State prison, and the summoning of the asylum superintendent from Kalamazoo to the same place; *third*, a joint examination and agreement,—either being competent to balance the other, and their disagreement turning the scale in favor of imprisonment.

It was held in *People ex rel. Att'y. Gen. v. Lawton, Judge of Probate*, 30 Mich. 386, that a law was not enforceable, unless it furnished adequate means to secure the purposes for which it was enacted. See, also, *People v. Smith*, 9 Mich. 193. It would be attributing more than folly to the legislature to assume that they would intentionally pass a law

which would leave a sane man liable to perpetual imprisonment where he has been acquitted of crime. There is nothing in this law or elsewhere which could compel the performance of the functions necessary to release a sane person committed to the insane asylum. The inspectors of the prison act, or not, as they see fit. Neither the prisoner nor his friends can compel action. No circuit judge can be compelled to perform functions not judicial in that capacity, and if he could, the law points out no means of bringing him and the medical superintendent away from their own counties at the command of a board of inspectors. The law furnishes no means of summoning and swearing witnesses, or securing the means of a fair examination, or of determining any rules of action.

But the more serious difficulty is in the nature of the proceedings themselves. In the first place, the prisoner is sent into confinement without any legal investigation into his condition at that time, when he may be perfectly sane, and when, having been acquitted, he is entitled to all the privileges of any innocent man. There may be a very long interval between the offense and the trial.

Having been so secluded, he is excluded from the right, and all others are excluded from the power of resorting to any effectual means, or any means whatever, of securing a judicial inquiry into his sanity. Neither judge nor expert has any power under our constitution to select his own means and process of inquiry, and pass *ex parte* upon the liberty of citizens. The proceedings contemplated by this statute are not only inquisitorial and *ex parte*, but the officers selected, who are undoubtedly as fit as any one to conduct such inquiries, have no power to act until the inspectors choose to call them. It practically leaves the liberty of the person confined to depend upon the uncontrolled pleasure of the inspectors. A more dangerous scheme, and one more entirely opposed to the constitutional provision securing to every one the protection of due process of law, could hardly be devised.

It is a result of the dangers which have been multiplied by the absurd lengths to which the defense of insanity has been allowed to go, under the fanciful theories of incompetent and dogmatic witnesses, who have brought discredit on science, and made the name of experts unsavory in the community. No doubt many criminals have escaped justice by the weight foolishly given by credulous jurors to evidence which their common sense should have disregarded. But the remedy is to be sought by correcting false notions, and not by destroying the safeguards of private liberty.

The judgment must be reversed, and the prisoner discharged.

COOLEY, J., and GRAVES, C. J., concurred.

Perley v. The County of Muskegon.

PERLEY v. THE COUNTY OF MUSKEGON.

(32 Mich. 132.)

County treasurer — liability as to county funds — liability of borrower from treasurer.

A county treasurer is the debtor and not the bailee of the county ; and therefore if he wrongfully lends money received by him as treasurer and afterward becomes a defaulter, the borrowers are not liable to the county in an action for money had and received.

Semble, that if such borrower is liable in any form of action it must be on the case, or by bill in equity.

ACTION for money had and received. The opinion states the case.

Ashley Pond and *C. I. Walker*, for plaintiffs in error.

A. T. McReynolds, Eggleston & Kleinhans and *D. Darwin Hughes*, for defendant in error.

CAMPBELL, J. Plaintiffs in error, who are surviving partners of Perley, Palmer & Co. (consisting of themselves and Charles Merrill, deceased), are sued for moneys alleged to have been received by or used for that firm, belonging to the county of Muskegon. The action is under the common counts for money had and received, and its items were given under a bill of particulars. The funds are claimed to have been furnished or used by Martin Perley, then county treasurer, out of county moneys in his hands. The case presents many separate questions of law and evidence, the most important of which relate to the legal position of the treasurer as financial officer of the county. There are also questions of partnership and agency, and of evidence. Martin Perley turned out to be a defaulter in office.

He became county treasurer on the 15th of January, 1869. The position of the various parties before and after that time was regarded as important on the trial, and was in some respects undisputed, and in others controverted. Before December 8, 1868, Martin Perley had been in partnership with the three other persons named, and had owned a mill with them in Laketon. On that day he sold out his interest in the mill to Jonas H. Perley, and the partnership was dissolved. When the firm of Perley, Palmer & Co. was formed does not very clearly appear. Their firm business was not chiefly done in that part of the State. From December, 1868, to the latter part of February, 1869, the mill was not

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in use, and Martin Perley received a small sum for watching it. About the 22d of February, 1869, Martin Perley made an arrangement to rent the mill from the owners for 1869, and continued to run it as lessee under that and a new arrangement until he went out of office in June, 1872. At the time of the first arrangement Palmer and Merrill owned a considerable quantity of logs, known as the Little River logs, in which Jonas H. Perley had no concern. These logs Martin Perley agreed to saw for them. During the same year he states that he sawed some other logs for all of them, as well as for other parties. He acted as agent for them in selling their lumber during his tenancy, and the proceeds passed through his hands. During this period he was sometimes in advance, and sometimes they were in advance. The balance against him on the account kept in their name was quite large. During this same period dealings were had in the separate name of Jonas H. Perley, on which the balance was also fluctuating. On the close of the business, and allowing all the Jonas H. Perley account (as claimed by Martin Perley) to have been a partnership business, the balance seems to have been against Martin Perley.

In the course of his business dealings with these various parties Martin Perley kept all his money indiscriminately in the same bank accounts, including county moneys and the proceeds of business transactions. The deposits were drawn out and renewed, and paper was discounted from time to time by the bankers, and the proceeds deposited. In some cases the accounts were overdrawn and subsequently made good.

The suit is based on the claim that defendants are responsible for all county moneys which entered into these dealings, as moneys which came to their hands unlawfully; and that, although refunded to Martin Perley, such refunding does not discharge the obligation unless used for the county purposes, or in some way applied specifically as county money. If the balance of accounts between Martin Perley and the firm in question was in their favor, it is evident they have reaped no profit, and have had no more in amount than was due them, and that Martin Perley has used up money for other purposes to the full extent of his defalcation; so that in refunding to the county they simply shift a debt from one creditor to another. The principal inquiry therefore relates to the nature of the county treasurer's powers and functions in dealing with the funds which have come to his possession.

The court below instructed the jury that the county treasurer stands on the footing of a bailee, and that moneys in his hands can never lose their character as a bailment so long as they can be traced; but remain county property throughout, whether deposited or remaining in the treas-

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urer's hands, except when coming into the hands of persons having no knowledge of their origin. Upon the question of constructive knowledge charges were also given which need not be referred to in this immediate connection.

The position of a public officer is peculiar, and the differences in the different systems of statutes show that the responsibility is not by any means uniform. There seems to be nothing at common law which distinguished public treasurers or depositaries from any other financial managers. Where the same person receives and pays out money, the identity of the particular money received must almost necessarily be changed constantly, and it must have been customary for a long time to place such funds in what may be supposed to be safer custody than private premises will always afford. The usual rule in regard to bailments exonerates the bailee who has done all that was in his power to prevent loss or accident, and there are authorities which on this ground discharge public treasurers from any greater liability. There are others which hold them to be debtors, and not bailees, and not exonerated under any circumstances.

It is well settled that in the case of all but special deposits, the money deposited becomes the property of the banker, and he becomes the debtor of the depositor. No depositor can, upon refusal to pay a check, replevy or seize the funds in the bank. His redress must be as a creditor in some form of action to enforce his debt. Statutes sometimes give priority to peculiar debts, but except in such cases the depositor has no advantage over any other creditors. *Com'l Bk. of Albany v. Hughes*, 17 Wend. 94; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Foster v. Essex Bank*, 17 Mass. 479; *Bank of Kentucky v. Wister*, 2 Peters, 318; *Graves v. Dudley*, 20 N. Y. 76; *Matter of Franklin Bank*, 1 Paige, 249; *Chapman v. White*, 6 N. Y. 412; *Downes v. Phoenix Bank*, 6 Hill 297; *Swartwout v. Mechanics' Bk.*, 5 Denio, 555.

The deposit which creates these contract relations must be either the money of the officer or of the public, but it cannot usually be that of both. If any officer is required or authorized by law to make deposits in any particular place or with any particular person, he is usually, if not universally, protected from any further responsibility, so long as he leaves it there, and is not a guarantor of the safety of the deposit. The ownership and liability appear to be co-extensive. In *Swartwout v. Mechanics' Bank*, 5 Denio, 555, this question came up and was carefully discussed. Swartwout, while collector of New York city, deposited money with the defendant bank in his official name, while he had a separate account in his individual name at the same time. Some time after his removal

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he signed a check for the balance, by the name of Samuel Swartwout, *late collector*, which the bank refused to honor on the ground that the money belonged to the United States, and had been applied by the bank, which had been a government depository, to balance their account with the government. The court held that it would not be sufficient to show this money had been officially received for the benefit of the United States, in order to entitle the government to the money. As the collector was not one of those officers who had been required by authority to deposit in these banks, it was like any other deposit. "liable to be drawn only by the depositor." The court use further this language: "The addition of 'collector,' in the keeping of the account, may have been, and probably was, to distinguish and keep separate the money he received in his official capacity from that which he received in his own individual capacity. But a deposit in this manner can hardly be deemed a payment over of the money in discharge of his official duty, or the execution of his trust. It is placed in deposit ready to be paid over upon his own draft, when called upon by the proper officer or authority. A deposit to the secretary of the treasury would have placed it beyond the control of the plaintiff; but a mere deposit by a collector in his own name, with his official addition, is no accounting for the money received by him in his official capacity. A county treasurer, sheriff, surrogate, or other such officer, opens an account with a bank with his addition, and keeps a separate account in such capacity; most clearly he can collect such deposits in his own name, and the bank would not be permitted to show that the money belonged to the county, etc. The same rule and principle apply to the present case."

The same principle was applied in *Sims v. Brittain*, 4 B. & Ad. 375, where money had been deposited with an agent in the name of one Gribble in a separate account as managing owner of a ship, he keeping a separate private account. After his death it was held no suit could be brought for this money except by his executors, and that the other owners could not claim it. The court liken it to a bank deposit, and say it was a loan to the agent by Gribble alone, and not enduring to any one else.

The same principle is illustrated by the course of the United States decisions on official liability. In *Elliott v. Swartwout*, 10 Peters, 137, and *Bend v. Hoyt*, 13 id. 263, it was held assumpsit would lie against a collector for money received by him in excess of duties, if paid under protest. An act was then passed requiring collectors when money was paid under protest not to retain it, but to place it to the credit of the treasurer of the United States, and provision was made for refund-

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ing out of the treasury. In *Cary v. Ourtis*, 3 How. 236, it was held that this change in the law exonerated collectors from liability in assumpsit for such moneys, whether the collector had paid it to the United States or not, since it was recoverable from him by the United States, and there could be no double liability in assumpsit for the same money.

In *U. S. v. Buford*, 3 Peters, 12, one Morrison, a deputy quartermaster-general, had paid to Buford, who was a deputy commissary, ten thousand dollars of government funds without legal authority. The payment was unauthorized and disallowed. An act of congress authorized a settlement, and credit to Morrison, on his assigning his claim against Buford. This was done, and in a suit against Buford by the United States, it was held the government had no better right than Morrison, and was barred by the same statute of limitations which would have applied to him as assignor. And in *Miltenberger v. Cooke*, 18 Wall. 421, where the collector of internal revenue had taken drafts instead of money for public dues, to avoid the risk of robbery in a dangerous district, it was held he could collect the securities in his own name. The statutes of the United States are too explicit to leave any doubt concerning the duties and responsibilities of officers dealing with public funds, and in providing where and how such moneys shall be kept. But in the only case where officers are allowed to choose their banks of deposit, they are required to do so at their own risk. U. S. Rev. Stat., § 2847.

The statutes of this State and of the territory have generally distinguished between the State and county funds, providing specifically for the deposit or preservation of the former, and leaving the latter to be dealt with and accounted for differently. In 1829 the territorial treasurer was required to keep a bank-book showing receipts and moneys drawn, and no money could be checked out except by checks countersigned by the auditor, and all moneys were to be deposited within three days after receipt, and such deposit exonerated the sureties. 2 Terr. L. 743.

The legislation since the State was organized has in like manner recognized bank deposits of State money, and has frequently regulated the subject.—See Laws of 1835–6, pp. 8, 9, 43, 61, 52, 63, 148; R. S. of 1838, pp. 29, 90, 98; Laws of 1839, pp. 58, 120; Laws of 1853, pp. 71, 88; Laws of 1855, p. 238; Laws of 1861, pp. 150, 583; Laws of 1863, p. 351. It is contemplated that all State funds shall remain specifically, either in the State treasurer's office, or as deposits in bank, so that they can be counted monthly. Laws of 1861, p. 31. And on the vacancy of

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the office by resignation, limitation or death the moneys, as well as other property in the treasury, are to be taken possession of specifically by the State officers. C. L. 1871, p. 160. There is no State money the title to which passes to the treasurer individually. His whole dealing with it is official and specific.

In the case of county treasurers there has never been any law authorizing or requiring them to make deposits or protecting such deposits, except as to State funds, by R. S. of 1838, pp. 90, 98. And there is no law authorizing any one but the treasurer to handle, or to intermeddle with the funds, but only to investigate the accounts. If he accounts fairly, and meets all obligations as presented, there can usually be no occasion to inquire further, and no such duty has been imposed of counting, as is required for State moneys. In regard to county funds the treasurers are responsible as debtors, and in case of vacancy the moneys belonging to the treasury are not to be taken possession of specifically, but are to be delivered over on oath, by the previous officer, if alive, and in case of his death, by his personal representatives. C. L. 1871, § 518. There is no principle which would allow private persons to meddle with county records or county funds in county possession. It can only be on the theory that the treasurer is a debtor, at all events, for the money received by him, and that the title vests in him personally, that his representatives can have any thing to do with the funds. Accordingly his liability is absolute, and not affected by unavoidable loss or accident, which, in case of bailments, could not fail to release him, without injustice.

Where the law has authorized or required a collecting officer to receive any thing but money, it has been held that as to such receipts he was only liable for what he specifically received. *Montgomery v. Governor*, 7 How. (Miss.) 68; *Peck, Trustee v. James, Trustee*, 3 Head, 75; and it was held in *U. S. v. Morgan*, 11 How. 154, that where an officer had lawfully received and canceled treasury notes which were afterward lost by his servant on the way to the post-office, he was only liable for the loss and inconvenience arising from their not being returned to the treasury, and not for their amount in money. But where, without such authority of law, he receives something else in lieu of money, he must account for it as money. *Coxe*, N. J. 242.

There has no doubt been some conflict as to this liability and its grounds. In *Supervisors of Albany v. Dorr*, 25 Wend. 440, where the officer's bond was in substance the same as here, it was held a county treasurer was not liable where the identical moneys he had received were stolen without his fault. This was affirmed in 7 Hill, 583, by a divided court, the chancellor voting for affirmance. The next year, in *Mussy v.*

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Shattuck, 1 Denio, 233, a town collector was held, under precisely similar circumstances, liable as a debtor. No attempt was made to overrule the former case, which was referred to, but the statutory duties were held broad enough to compel the liability. This case was also affirmed on error, but no opinion published. See note to 7 Hill, 584. In some cases the liability has been based on the terms of the official bond, which is supposed to have enlarged his liability, and made it rest on contract. *U. S. v. Prescott*, 3 How. 578, followed in *U. S. v. Dashiell*, 4 Wall. 182, and *U. S. v. Keebler*, 9 id. 83. In this latter case, however, the court lay stress on the fact that the defendant had paid over United States funds to the confederate authorities without any proof of coercion, and refer to the acts of congress relieving parties who have been deprived of funds by force. In *Boyden v. U. S.*, 13 Wall. 17, where the bond was merely to perform the trust faithfully, the same absolute liability was enforced against a receiver who had been robbed by violence. In *Bevans v. U. S.*, 13 Wall. 56, the receiver, if he had done his duty, would have paid over the funds in his hands before the war, and was in actual default, and the court expressly reserve an opinion as to his liability if he had been innocent. The same is true of *Halliburton v. U. S.*, 13 Wall. 63. In *Commonwealth v. Comly*, 3 Penn. St. 372, and *State v. Harper*, 6 Ohio St. 607, the liability is rested on contract.

It is to be remarked that the United States statutes have usually required the identical money received to be kept and paid over, so as to create a bailment in the strict sense of the term, and the decisions have recognized the holder as a bailee, but with liability increased by contract.

The cases decided are not, as it is seen, entirely consistent. It is difficult to see how an officer can be compelled to give a bond going beyond his official duties, as a condition of being allowed to hold his office. Where an office is purely of legislative creation, of course it can be subjected to any conditions deemed proper. But it seems more reasonable to construe all the statutes together, and to make the bond the measure of official duty, instead of making it an independent contract. Most of the decisions in regard to local treasurers have done this. We have found no decisions in other States upon the liability of State treasurers, but our own statutes have distinguished them to some extent as suggested, and their duties are usually such as to require constant attention, whereas many of the local officers have very light official duties, and are differently situated as to banks and other instrumentalities of finance.

In *Colerain v. Bell*, 9 Metc. 499, the question came up directly as to the character of funds in the hands of a collector. He had been collector for two separate years, 1840 and 1841, and had applied some collections

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of 1841 to cover up his deficiencies in 1840, and his sureties for 1841 insisted they were entitled to the benefit of these payments, and that the credit should be changed to 1841 by the town. But the court held otherwise, and used this language: "Neither is it a case of misapplication of any specific funds which the collector was bound to pay to the treasurer of the town. The specific money received by a collector in the collection of taxes is his money, and not that of the town." And in *Inhabitants of Hancock v. Hazard*, 12 Cush. 112, the liability of a treasurer for stolen money was rested on the principle of *Colerain v. Bell*, that it was his own money, for which he had become a debtor, and liable at all events. This same principle has been recognized several times in Indiana, and the idea of bailment repudiated. *Allen v. State*, 6 Blackf. 252; *Morbeck v. State*, 28 Ind. 86; *Halbert v. State*, 22 id. 128; *Rock v. Stinger*, 36 id. 346; *Steinback v. State*, 38 id. 483; in New Jersey, in *Board of Justices v. Fennimore*, Coxe, 242, and in Pennsylvania, in *Hayes, Treas. v. Grier*, 4 Binney, 80.

Some of these cases are very instructive. In *Morbeck v. State*, it was shown that the town treasurer had the best safe in town, and the money stolen was kept separate, and a considerable amount of his own was stolen with it. In *Halbert v. State*, the county commissioners had purchased a safe and ordered the county money to be kept in it, which was done, and the safe broken open and robbed. It was held the treasurer was a debtor, and not a bailee, and could do with the money as he chose, and must bear the responsibility, and that their order was beyond their authority and would not avail him. In *Rock v. Stinger*, the treasurer had loaned out county money on notes payable to him officially, and it was held they were his individual property, and not that of the county. This case refers to the decisions, and discusses the relations of the officers very fully, and among other things recognizes the rule indicated by our statute as to the death of an officer, using these remarks: "Suppose a township trustee should die, with moneys received by him as such in his hands, can it be claimed that the money, even if the specific bills or coin received by him officially could be identified, would go to his successor, and not to his administrator? We think it quite clear, in the case supposed, that the money would go to the administrator, because simply the title was in the trustee. This view is fully sustained by authority," etc.

In *Steinback v. State*, 38 Ind. 483, the facts were in some respects like those at bar. A township trustee kept bank deposits in which he mixed his own and township funds, and overdrew his account, and paid township debts with the overdraft, for which he gave his official due-bill. But it was held the deposit account was a private matter in which

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neither the township nor the sureties on his bond had any concern, and on which they were not liable for what was drawn.

The relations of a treasurer to money in his hands are also considered in a similar way in *Inhabitants of New Providence v. McEachron*, 4 Vroom, 889.

Although a legislative construction is not authority for the past, yet the law of 1874, providing for the deposit of Wayne county funds, and forbidding their loan on deposit except under conditions specified, and postponing its operations until the next official term of the county treasurer, indicates what has been the general understanding on this subject. 2 L. 1874, p. 8.

If the moneys in bank were not throughout held under contract relations with the county itself, then it is impossible to see how an action would lie for money had and received, either against the bank primarily, or against those who receive it from the bank. Neither can it be clear otherwise why the bank would not in every case of a check be bound to look to the purpose for which it was drawn. County funds, as such, cannot lawfully be drawn from the county treasury at the mere will of the treasurer. He must have county vouchers for them. But if money as soon as received by him is credited to the county, no second credit can be needed, and whether the treasurer in his discretion keeps it in his own office or elsewhere, will not change the accounts. The treasurer receives money daily, not only from different sources, but for different purposes. Some of it is liable to deductions for his pay. Some belongs to the State, some to the town libraries, and other funds to other purposes. These cannot be distinguished in his hands so as to make one rather than another suffer for his defaults. Whether he deposits money, or spends it, or keeps it, and whether he loses it honestly or dishonestly, his liability is the same. He must account for the sums, and not the identical funds received, and must account for them at all events. There can be no middle ground between personal and official ownership of moneys.

If the moneys used by Martin Perley could be treated as specifically county funds, the liability of parties receiving them would be immediate, and would not depend upon his default. They might have been sued at any time, before as well as after his accounting; and that is the effect of the charges given. But in case his final default should exceed the amount received by one party, and not reach the sum of all his loans, it would at once raise a difficulty not easily disposed of. But in law there can be no difference between a loan to a banker and a loan to any one else. There is no rule of law which presumes one borrower without security is safer than another. And where, as here, the deposits

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were promiscuous and from all sources, it would be idle to attempt to attach contract relations with the county to funds which no ingenuity could identify.

There is not much difficulty in reaching the personal duty of the treasurer. He is bound to have money to pay liabilities as required, to the full extent of his receipts. And he is bound when his term ends to have the balance ready to turn over to his successor. He could not be liable to a civil action if he makes all the payments required by law to be made. He and his sureties are bound on their bond when any such failure occurs. And it appears to be reasonable that if he has with any dishonest understanding put money into the hands of others which has not been returned, and which it was known could not have come from any other source, and could only have been derived from his office, and must be officially accounted for and restored, those persons have done an injury for which they should be accountable to those whom they have injured. It may be questionable how far the county could be regarded as directly damnified, if the sureties are responsible, or damnified beyond the deficiency in their ability. But there can be no injury where all that is borrowed has been restored. In such a case as the one suggested the injury consists in destroying to a given extent his power to meet his obligations, and this cannot be done when he is placed again in his former position. As he is the only legal custodian of county funds, no one can be required to do more than put them in his hands. He has a right to demand them, and he can keep them where he pleases. He is himself, to all intents and purposes, the treasury, and bound to account for all that he receives, and no one else can supervise his action.

But an action based on any such theory must be an action on the case, or a bill in equity, and not an action for money had and received. It can never be determined in advance when money is lent, how far the county will be injured, or that it will be injured at all. And the action is not based on the source or identity of the particular funds which have been used. It must depend more on the state of the accounts than upon the identity of the money, and the wrong is much in the nature of a voluntary transfer of property in fraud of creditors, whereby they will be delayed or hindered, and of which the county may justly complain if actually defrauded.

As we are of opinion that the action is improperly framed, we need not discuss the other questions.

The judgment must be reversed, with costs, and a new trial granted.

The other justices concurred.

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(32 Mich. 313.)

Consideration — agreement to withdraw objections to bankruptcy proceedings.

The consideration of a contract was that one of the contracting parties should withdraw opposition to bankruptcy proceedings pending against his firm and consent to an adjudication against them. *Held*, that the consideration was valid.

ACTION on a contract. The opinion states the case.

A. M. Culver, Alvan Peck and Theodore Romeyn, for plaintiff in error.

Rienzi Loud and C. I. Walker, for defendants in error.

CAMPBELL, J. Suit was brought below on an agreement by defendants to furnish to Jesse Crowell the value of a certain house formerly owned by him, or means to buy it, and also money enough to support him. The alleged consideration was his withdrawal of opposition to certain bankruptcy proceedings pending against his firm, and consent to amendments and adjudication against them. A separate count contained the averment of an additional agreement to procure the withdrawal of opposition by the other partners.

The facts averred are set forth substantially as follows: On the 3d day of February, 1871, Crowell owned the dwelling-house property in question, at Albion, which is valuable. On the 15th of October, and until February 17, 1871, he was a member of a commercial firm at Albion, under the style of J. Crowell & Co., composed of himself, William V. Morrison and Osman Rice. The firm was indebted to various creditors, among whom were the defendants, and the First National Bank of Marshall, and the National Exchange Bank of Albion, of which latter Irwin was president. On the 4th of November, 1870, these two banks (the latter by Irwin as its president) filed a petition in bankruptcy against the firm, with the necessary jurisdictional allegations, averring an act of bankruptcy by the suspension of payment of their paper, and also setting up individual acts of bankruptcy against Rice. On the 23d of November the respondents in bankruptcy joined issue, denying the acts of bankruptcy, and demanding a trial by jury, which had not come to trial on the 14th of February, 1871, when Crowell withdrew and procured the others to withdraw opposition, and consented and procured their consent to the steps contemplated by the contract. On the 3d day of February, 1871,

the contract is alleged to have been made as before mentioned. On the 9th of March defendants proved their debts and became parties to the proceedings.

The defendants demurred to the special counts, the grounds of demurrer being, 1st, that the declaration sets out no consideration for the promises of the defendants; 2d, that the contract was void as against public policy; and 3d, that it was a fraud on the partners of Crowell. The demurrer was sustained, and error is brought on the rulings.

The objection for want of consideration rests on several distinct grounds which were, in substance, that there was nothing showing a doubtful case, or a defense, or belief in a defense, in good faith, to the bankruptcy, and nothing to show that the proposed amendments were material, or that defendants could have been benefited, or Crowell injured, by his consent to the adjudication. It is insisted that all these, or enough of them to make out a consideration, should affirmatively appear.

If the arrangement was not illegal, it is not disputed that it may be upheld if any valid consideration appears. But it is claimed there is no presumption of that kind arising out of the facts set out. The rule as to consideration for agreements to abstain from litigation, present or contemplated, does not seem to differ from that relating to any other contracts, although upon the facts difficulties often arise. The rule seems to be well determined, that there must be a benefit on one side, or a detriment suffered or service done on the other. We find nothing to indicate that the benefit rendered need be to the party contracting, if it is to any one else at his procurement or request, any more than in other contracts. And in the present case, if the arrangement made was to the detriment of Crowell, or for the advantage of the petitioning creditors, it is not important what share defendants may have had in the advantage. *Pullin v. Stokes*, 2 H. Bl. 312; *Smith v. Algar*, 1 B. & Ad. 603; *Anonymous*, Cowp. 129; *Rood v. Jones*, 1 Doug. (Mich.) 188. It is admitted that if Crowell lost any advantage which he had a right to insist upon, or if the creditors obtained an advantage otherwise not obtainable, and which Crowell had a right to withhold, or if there was an honest doubt concerning their respective rights, there would be a sufficient consideration. But it is not admitted that the declaration shows this.

By withdrawing opposition to the bankruptcy proceedings, and consenting to amendments and to a decree, Crowell divested himself of the possessory control and of the legal ownership of his whole estate, and subjected it without further delay to the disposition of the bankrupt court, and to ratable distribution by an assignee among his creditors. He had a right to the control of it until otherwise ordered by the bank-

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rupt court, and he could not lose title to it unless adjudged a bankrupt. If not so declared, he would have retained the dominion recognized by the common law and State statutes, and could apply it as he saw fit so long as he committed no fraud. He thereby gave up a positive value in present enjoyment, and a contingent right of absolute control and dominion, in case he succeeded on the issue.

That these were valuable rights cannot be doubted. The courts regard involuntary bankruptcy as an injury to which a party should not be subjected except for his legal omissions or violations of duty. The Supreme Court of the United States has recognized this principle very plainly, in refusing to raise presumptions of fraud to bring transactions within the statutes. See *Mays v. Fritton*, 20 Wall. 414, following *Wilson v. City Bank*, 17 id. 473, in which the subject is fully discussed. Mr. Justice MILLER says, concerning involuntary bankruptcy (p. 482), "But when a person claims to take from another all control of his property, to arrest him in the exercise of his occupation, and to impair his standing as a business man, in short to place him in a position which may ruin him in the midst of a prosperous career, the precise circumstances or facts on which he is authorized to do this should not only be well defined in the law, but clearly established in the court." And Lord KENYON, in *Kaye v. Bolton*, 6 T. R. 134, sustaining an agreement to withdraw bankruptcy proceedings, on the promise of a third person to pay creditors, as entirely reasonable, says: "It would be monstrous to say that the bankrupt's estate shall still be torn to pieces by the expenses of the commission." Common experience shows that an estate can seldom be applied in bankruptcy as prudently or economically as in private hands, by debtors, and that often (as remarked by MILLER, J., in 17 Wall. 486), "by forbearance of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally able to pay all, and to save their commercial character and much of their property.

The law gave Crowell an absolute right to contest these proceedings before a jury, of which he could not be deprived, except by consent. This right he surrendered by the agreement in question, if made as alleged.

On the other hand, if we assume the allegations to be true, it appears, and must be taken as true, that the creditors of the firm thought it for their advantage to procure a decree in bankruptcy, and were willing to pay a large price for that privilege. They, and not Crowell, appear as the parties anxious for a withdrawal of the legal controversy to be submitted to the jury, and for a confession of judgment (or what is analogous to that) which would expedite their proceedings, and prevent abso-

lute delay and possible failure. It is plain that this was in fact, and was considered, an advantage.

We have, then, a double consideration, whereby Crowell gave up important rights, and the creditors gained important advantages.

It is urged, however, that unless Crowell had a defense, or at least a case of doubt in his favor, that there was no justice in defending, and therefore no consideration for abstaining which the law can favor. And reference is made to compromises where no suit has been commenced, as standing on the same footing with cases of litigation. There are some cases which appear to confound the distinctions, and which may deserve consideration, although upon the present declaration without amendment it is doubtful whether it is very important. But the questions are before us, and cannot be regarded as foreign to the case.

It has been held that a party who gets an agreement in his favor, by a relinquishment or an agreement to relinquish a right, must have some right, or some show of a right to relinquish. This was held in *Edwards v. Baugh*, 11 M. & W. 641, in regard to a declaration on an agreement to abstain from prosecuting, which did not aver any debt, actual or supposed. This case, however, contains an express assertion that if suit had been commenced before the compromise, no such showing would be needed, and the saving of litigation and its attendant expenses would be a sufficient consideration in itself. In *Cook v. Wright*, 1 B. & S. 559, the court intimate that the declaration in *Edwards v. Baugh* was sufficient, and that the decision was questionable. In *Kaye v. Dutton*, 7 M. & G. 807, the consideration was confined to the transfer of an interest, and held bad because there was none. In *Jones v. Ashburnham*, 4 East, 455, it was held an agreement to forbear suit was nugatory unless it was in favor of some person named or otherwise designated, and in that instance there was no person liable to suit indicated or existing. In *Barber v. Fox*, 2 Wm. Saunders, 136, an heir's promise, based on a bond in which there were no words binding heirs, was held invalid, as, in *Tooley v. Windham*, Cro. Eliz. 206, was a promise to compensate a personal tort of an ancestor, on which there was no surviving cause of action. In *Seaman v. Seaman*, 12 Wend. 381; *Busby v. Conoway*, 8 Md. 55; *Prater v. Miller*, 25 Ala. 320, it was held an agreement not to oppose a will formed no consideration for a compromise, unless the party would be in some way interested in its defeat. See, also, *Jarvis v. Sutton*, 3 Ind. 289. And in *Rood v. Jones*, 1 Doug. (Mich.) 188, it was held an agreement not to attach property, where there was nothing to attach, was no consideration for a promise. But in the latter case, as in the best considered cases generally, it is also held, that when parties have acted without fraud, the

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burden is on the defendant to defeat the agreement, which will be presumed good until facts are alleged against it to invalidate it. *Paris v. Dexter*, 15 Vt. 379; *Wade v. Simeon*, 2 C. B. 565; *Gould v. Armstrong* 2 Hall (S. C.), 267. And if the parties act in good faith, even where they know all the facts, and there is a promise without legal liability to base it on, the courts hesitate to disturb the agreements of parties on any assumption that an advantage which they have obtained, and conceive to be worth paying for, is not considered valuable. The decisions in this State have gone far to sustain such bargains. *Weed v. Terry*, 2 Doug. (Mich). 344; *Van Dyke v. Davis*, 2 Mich. 148; *Moore v. Detroit Locomotive Works*, 14 id. 266; *Hull v. Swarthout*, 29 id. 249; *Gates v. Shutts*, 7 id. 127. In *Van Dyke v. Davis*, the party had no title whatever. In *Moore v. Locomotive Works*, the defendant had become liable for not delivering machinery, and it was regarded as an advantage gained to the plaintiff to get the property, instead of a lawsuit for damages, so as to uphold a waiver of delay. In *Gates v. Shutts*, the claim was supposed to be barred by the statute of limitations.

The decisions generally hold that an agreement to settle an existing suit is sustainable without reference to the merits of the controversy, unless under very peculiar circumstances. It is so held on the ground that an alteration in the position of the parties may of itself be an advantage, and may, in the absence of fraud or other controlling reason, be a sufficient consideration. In *Cook v. Wright*, 1 B. & S. 559, the court held that there could be no doubt whatever that the compromise of a suit was a sufficient consideration; but that the reason was not the saving of the costs, but the change of position, and that in all cases where parties had so changed their position the same rule would apply. There a person not liable for a rate had compromised it with the commissioners and agreed to pay the reduced sum, both knowing the facts but differing as to the law; and he was held liable. In *Barlow v. Ocean Ins. Co.*, 4 Metc. 270, it was held a settlement with an insurance company could not be disturbed by the subsequent discovery of facts which would have prevented it if known. In *Wade v. Simeon*, 2 C. B. 565, it was said that the fact that a plaintiff knew he had no cause of action would not necessarily defeat a compromise unless he knew he could not under any circumstances have got a verdict. In *Gould v. Armstrong*, *supra*, the test was likewise stated to be whether there "could be" any recovery. In *Union Bank v. Geary*, 5 Pet. 113, the parties were not ignorant of the facts, but the law was doubted. So in *Longridge v. Dorville*, 5 B. & Ald. 117, it was held a compromise would not fail unless it was clear there could be no possible liability.

The cases refer, among other things, to the contingencies of losing testimony as not to be disregarded. And in *Cooper v. Parker*, 15 C. B. 822, the doctrine is very broadly laid down. A defendant had pleaded infancy, which was not true in fact. The suit was compromised for a smaller sum, and that plea was by the same agreement withdrawn. The court held the plaintiff bound. PARKE, B., uses this language: "I cannot see why this is not a good plea. The value of the defendant's giving up the question in the action in the county court cannot be ascertained. In dealing with a plea of this sort, the court does not enter into a consideration of the value of the satisfaction if the plaintiff agrees to accept it. The advantage to the plaintiff of the defendant's giving up the plea of infancy in the county court, though an untrue one, might be great." MARTIN, B., very briefly concurs by saying still more broadly, that parties should be allowed to have their agreements carried out as they make them. The decision was unanimous.

It is also held that the presumption will always be raised that pleadings are not put in for sham purposes or in bad faith, and that they cannot be attacked except upon averments to the contrary. *Bidwell v. Catton*, Hobart, 216; *Smith v. Monteith*, 13 M. & W. 427; *Wilson v. City Bank*, 17 Wall. 473.

There is no reason for presuming unfairness when parties are merely relying on their legal rights, and no reason why they should be debarred from demanding compensation for giving them up. If there has been fraud or unfairness in bringing about a settlement, the want of any honest cause of action or probable defense may be a fact to be considered among the rest.

In the present case Crowell does not appear on the pleadings as the moving party, and there is nothing to indicate fraud. He gave up valuable privileges, and the creditors got valuable benefits thereby, on which they put their own estimate. The bargain cannot be presumed to have been fraudulent, and the consideration is valid, unless the whole transaction was unlawful.

Upon the general question, see further, *Morey v. Newfane*, 8 Barb. 658; *Stoddard v. Mix*, 14 Conn. 12; *Farmers' Bank v. Blair*, 44 Barb. 652; *Atlee v. Backhouse*, 3 M. & W. 633.

So far as any question arises concerning fraud against Crowell's partners, we do not perceive how it can be presented on this record. If the defendants could set up any fraud against them to avoid the contract, upon which we need not pass here, such fraud is not to be presumed. And under the second count, which avers their consent, it must be likewise presumed to have been fairly obtained.

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Neither do we think there is any ground for holding such an agreement to be in fraud of the bankrupt law. It has been held that secret agreements by favored creditors to withdraw opposition to the discharge of debtors, or to abstain from examining them, are void, because by their position in the case other creditors are at liberty to rely on their prosecuting all necessary inquiries and developing all important facts, which such agreements tend to smother. It is held such arrangements have a direct tendency to favor fraudulent dealings with assets, and to conceal the truth upon the merits. *Hall v. Dyson*, 10 L. & Eq. 424; *Dexter v. Snow*, 12 Cush. 594; *Tuxbury v. Miller*, 19 Johns. 311; *Bell v. Leggett*, 3 Seld. 176; *Nerot v. Wallace*, 3 T. R. 17. And on similar principles a secret promise to pay a creditor, who signs a compromise with others, and so induces them to regard him as acting without such an inducement, is held fraudulent. *Case v. Gerrish*, 15 Pick. 49.

But a debtor who devotes all his property to be used ratably for all his creditors does what the law highly favors and approves. This is the very aim and purpose of the bankrupt law, and the only end for which the petition in bankruptcy was filed. No act can be in fraud of a law which it is intended and calculated to carry out. Crowell merely bargained to submit to the purposes of this law, when he had before resisted the attempt to bring him within it. If it had been a bargain to conceal or withdraw his assets from distribution, or to procure a collusive discontinuance of the suit after other creditors had appeared, there might have been some reason for doubting its validity. But an agreement to submit to a bankruptcy decree, and to have the estate disposed of in due course of law, is entirely proper and valid.

The judgment should be reversed, and the demurrer overruled, with costs, and the cause remanded to the court below, that the defendants may plead over.

The other justices concurred.

 Youngblood v. Sexton.

YOUNGBLOOD V. SEXTON.

(32 Mich. 406.)

Tax — equity will not restrain collection of. Constitutional law — tax on liquor — taxation is not "license."

Equity has no jurisdiction to restrain the collection of a personal tax, even if it be illegal; nor will it assume jurisdiction to prevent a multiplicity of suits when the parties have, severally, remedies at law.

A statute provided for the assessment of a specified tax on liquor dealers, the money thereby raised to be devoted to the use of the towns, villages, and cities in which the business was carried on. *Held*, (1) not a "State tax," and therefore not within the constitutional provision directing the application of "specific State taxes;" (2) that the fact that the same tax was levied on all dealers without regard to the amount of business did not render it unjust or unequal; (3) that the parties taxed could not object because the municipality had no voice in the levy, nor because the sheriff and not the tax collector was made the collector, and (4) that the tax was not equivalent to a license so as to come within the constitutional prohibition of licensing the sale of liquors.

BILL in equity to restrain the collection of a tax assessed against the several complainants separately in respect to the business of liquor dealers. The opinion states the case.

Romeyn & Weir and *F. A. Baker*, for complainants.

George H. Prentiss, *C. A. Kent* and *Andrew J. Smith*, Attorney-General, for defendant.

COOLEY, J. The bill in this cause was filed to restrain the collection from the several complainants of a tax assessed against them separately, in respect to the business in which each is engaged. It is a personal tax purely. It was decided at an early day in this State, that equity had no jurisdiction to restrain the collection of a personal tax, even conceding it to be illegal; the ordinary legal remedies being ample for the party's protection. *Williams v. Detroit*, 2 Mich. 560. The principle has ever since been regarded as not open to controversy in this State, and it was applied without its soundness being contested in *Henry v. Gregory*, 29 Mich. 68, decided last year. In other States it is supported by a strong preponderance of authority. *Brewer v. Springfield*, 97 Mass. 152; *Durant v. Eaton*, 98 id. 469; *Loud v. Charlestown*, 99 id. 208; *Whiting v. Boston*, 106 id. 89; *Hunnewell v. Charlestown*, 106 id. 350; *Rockingham Savings Bank v. Portsmouth*, 52 N. H. 17; *Dodd v. Hartford*, 25 Conn. 832; *Ritter v. Patch*, 12 Cal. 298; *Berri v. Patch*,

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12 id. 299; *Worth v. Fayetteville*, Winst. Eq. (N. C.) 70; *Van Cott v. Supervisors*, 18 Wis. 247; *Greene v. Mumford*, 5 R. I. 472; *Mc Coy v. Chillicothe*, 8 Ohio, 370; *Conley v. Chedic*, 6 Nev. 322; *Deane v. Todd*, 22 Mo. 90; *Sayre v. Tompkins*, 23 id. 443; *Barrow v. Davis*, 46 id. 394; *McPike v. Pew*, 48 id. 525; *Brooklyn v. Meserole*, 26 Wend. 132; *Intendant v. Pippin*, 31 Ala. 542; *Baltimore v. Baltimore & Ohio R. R. Co.*, 21 Md. 50; *Dows v. Chicago*, 11 Wall. 109; *Hannewinkle v. Georgetown*, 15 id. 547.

The question then presents itself, how this bill came to be filed, and on what ground the Superior Court was asked to and did proceed to render a decision on the merits. The jurisdictional question has not been argued in this court, but we are not inclined to pass it over in silence, thereby giving countenance to the idea, that by the mere acquiescence of parties a jurisdiction may be made for a court of chancery, by means of which the extraordinary remedy by injunction can be made use of to restrain public officers in their action, where neither the legislation of the State nor the general principles which control the action of courts have ever given this remedy. The writ of injunction is peculiarly liable to abuse; and the practice of resorting to it in cases where it is not allowed by law, relying upon the opposite party to overlook or waive the illegality, is not one that can safely be encouraged or sanctioned. The jurisdiction of courts is never subject to be enlarged or diminished at the discretion of parties; and it would be peculiarly mischievous to permit jurisdiction to rest upon consent or waiver in cases where general public interests are to be affected by the litigation.

The grounds suggested, but not argued, as giving equitable jurisdiction in the case, are, *first*, that thereby a multiplicity of suits may be avoided; *second*, that otherwise the proceedings may ripen into a cloud upon the title to complainants' land; and, *third*, that irreparable injury is threatened to complainants in their business. As the tax is only personal, and as yet affects no real estate, and may never do so, the second ground calls for no consideration. The force of the third must rest in the fact that enforcing the tax may in some cases compel the suspension of business, because it is more than the person taxed can afford to pay. But if this consideration is sufficient to justify the transfer of a controversy from a court of law to a court of equity, then every controversy where money is demanded may be made the subject of equitable cognizance. To enforce against a dealer a promissory note may in some cases as effectually break up his business as to collect from him a tax of equal amount. This is not what is known to the law as irreparable injury. The courts have never recognized the consequences of the mere enforcement of a money demand

as falling within that category. It is true the Federal courts have treated the unlawful taxation of a franchise as a case of possible irreparable injury. *Osborn v. United States Bank*, 9 Wheat. 738. But this was on the ground that the tax, if enforced, might destroy the franchise, and in effect the corporation itself,—the artificial person which was taxed,—and the case has little analogy to that of the taxation of a particular business carried on by individuals.

If complainants rely upon the jurisdiction of equity to take cognizance of a controversy where thereby a multiplicity of suits may be prevented, the reliance fails, because the principles that govern that jurisdiction have no application to this case. It is sometimes admissible when many parties are alike affected or threatened by one illegal act, that they shall unite in a suit to restrain it; and this has been done in this State in the case of an illegal assessment of lands. *Scotfield v. Lansing*, 17 Mich. 437. But the cases are very few and very peculiar where this can be permitted, unless each of the complainants has an equitable action on his own behalf. Now, the nature of this case is such that each of these complainants, if the tax is invalid, has a remedy at law which is as complete and ample as the law gives in other cases. He may resist the sheriff's process as he might any other trespass, or he may pay the money under protest, and at once sue for and recover it back. But no other complainant has any joint interest with him in resisting this tax. The sum demanded of each is distinct and separate, and it does not concern one of the complainants whether another pays or not. All the joint interest the parties have is a joint interest in a question of law; just such an interest as might exist in any case where separate demands are made of several persons. Such a common interest there might be if several persons should give several promissory notes on distinct purchases of a worthless article; and such there might have been under the former prohibitory liquor law had demands been made against several persons for liquors illegally sold to them. We venture to say that it would not be seriously suggested that a common interest in any such question of law, where the legal interests of the parties were wholly distinct, could constitute any ground of equitable jurisdiction when the several controversies affected by the question were purely legal controversies. Suits do not become of equitable cognizance because of their number merely. This was affirmed in *Lapeer County v. Hart*, Har. Ch. 157, and in the two cases of *Sheldon v. School District*, 25 Conn. 224, and *Dodd v. Hartford*, id. 282, which in their facts, so far as this question is concerned, were like the present case, with a single exception which is not to the advantage of these complainants. In those cases the single assessment of a school-tax was involved, and the

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parties concerned, if permitted to unite, might have had the whole controversy determined in the one suit. In this case the controversy is either separate, as the tax is several against each individual, or it is general, as it affects all the persons taxed under the law. Considered as a controversy which affects all the persons taxed, this suit would wholly fail in the purpose of preventing a multiplicity of suits, because the court in which it was brought has only a local and limited jurisdiction. Other suits might be brought outside of Detroit, and in every county of the State; and at best this suit would only reduce the number of suits, while it could not prevent a multiplicity of them. On this general subject we content ourselves with referring further to *Jones v. Garcia*, 1 Turn. & Russ. 297; *Yeaton v. Lenox*, 8 Pet. 123; *Adams' Eq.* 198-202.

Other considerations on this branch of the case we abstain from presenting, because an argument has been withheld; and under such circumstances we deem it advisable to present none but those which are not only conclusive, but are unquestionable. We present these for the purpose of showing that if the merits of this controversy were with the complainants, the bill would nevertheless be dismissed, because the parties have no standing in a court of equity. They cannot make remedies for themselves which the law has not given them. We do not know whether there was any express assent on the part of the defendant to this jurisdiction. If there was, it could be of no avail, for reasons already stated. He would be powerless in any case, but specially so in a case like the present, where he is acting in a public capacity; and the consent, if given, would not be on his own behalf, but on behalf of the public, whom for any such purpose he has no authority to represent.

The question then arises whether, the case being one of which the court below had no jurisdiction, this court on appeal shall proceed to express an opinion upon the merits. The considerations which bear upon that question are conflicting. As a general rule an opinion on the merits of a controversy ought to be declined when the court is powerless to give the relief demanded. But this case is in many particulars exceptional. It has been argued on the merits, the State intervening for the purpose; and there is no reason for any suggestion or suspicion that in this court, at least, it is not a *bona fide* controversy. The legal points involved in the merits have been presented in good faith, and we have no reason to suppose that, should the controversy be presented again in a more regular form, the case would assume any different phase on the argument. There is, besides, abundant reason apparent on this record for believing that the public interest demands an early determination of the questions involved. The pendency of this suit has to some extent

delayed for a considerable period the enforcement of a State law which is supposed to be of high importance; and if this should go off on the jurisdictional question, there is reason to look for further litigation which would constitute a ground, or at least a pretense for further delay. Under all the circumstances, we are agreed that an examination of the case on the merits, and an opinion thereon, are not only justifiable, but are demanded by considerations of public importance.

The question which lies at the foundation of the litigation relates to the validity of the act for the taxation of the liquor traffic, passed May 3, 1875. General Laws of 1875, p. 274. The complainants, it appears, have severally been assessed a tax as dealers in liquors, and they contest the payment on the ground that the legislature had no constitutional authority to impose it. A number of reasons are assigned for the invalidity of the tax, and these we shall consider separately.

1. It is objected that the tax is a State specific tax, and that the law imposing it is unconstitutional, because it devotes the money raised to the use of the towns, villages and cities in which the business taxed is carried on, in violation of Article I, § 14 of the Constitution, which provides that "all specific State taxes, except those received from the mining companies of the Upper Peninsula, shall be applied in paying the interest upon the primary school, university and other educational funds, and the interest and principal of the State debt, in the order herein recited, until the extinguishment of the State debt, other than the amounts due the educational funds, when such specific taxes shall be added to and constitute a part of the primary school interest fund." The only question that arises upon this objection is whether this tax is a State tax or not. It was settled in *Walcott v. People*, 17 Mich. 68, that the State might pass laws for the levy of new specific taxes, and in *Kitson v. Ann Arbor*, 26 Mich. 325, that local specific taxes might be authorized. The substantial difference between this case and the one last cited consists in the fact that there the tax was levied under a city ordinance and here it is levied by general law. In both cases the money was to be put to local purposes. In one sense, undoubtedly, any tax levied by a general law is a State tax; but if the moneys are to be put to local uses, the only substantial difference between that and one levied by local action consists in this: that in one case the State levies the tax, and in the other it authorizes the levy. All taxation must be authorized by the State, and we know of no reason why all taxation for the ordinary purposes of government may not be levied under general laws when no express provision of the Constitution forbids it. Such legislation is no novelty in this State or elsewhere. Highway and school taxes are very

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commonly levied in that way ; the local authorities, as to some of them, having no option, but being put under legal compulsion to assess and collect them. The school mill tax may be taken as an illustration. Collected under a general law, it was nevertheless put to the uses of the community which paid it ; and it was in no proper sense any thing more than a local tax. Neither is the tax now in question.

2. It is said the tax is invalid because it is not levied on any principle of equality or uniformity, and consequently lacks one of the essential elements of lawful taxation. If the precise point here is that the tax is unequal and unjust because it is not levied in proportion to the business done, then the objection is without force. It may possibly be true that an apportionment according to the business done would have been more just ; but a question of this nature concerns the legislature, and not us. Courts cannot annul tax laws because of their operating unequally and unjustly. If they could they might defeat all taxation whatsoever ; for there never yet was a tax law that was not more or less unequal and unjust in its practical workings. *Kirby v. Shaw*, 19 Penn. St. 258 ; *Commonwealth v. Savings Bank*, 5 Allen, 428 ; *Allen v. Drew*, 44 Vt. 174 ; *Grim v. School District*, 57 Penn. St. 483 ; *People v. Worthington*, 21 Ill. 171 ; *Coburn v. Richardson*, 16 Mass. 213, 215 ; *Citee v. Society for Savings*, 82 Conn. 173, 184. But the objection to a want of uniformity is wholly misplaced here. Uniformity is the very basis of this tax. It is levied entirely without discrimination ; and the real objection made to it is, not that it lacks uniformity, but that the legislature were unjust in making it uniform instead of levying it by some standard of discrimination. The objection presents a case of misapplication of terms. It is also presented to the wrong tribunal. The question whether a tax is just and equal or not is not a question of law. And this will meet any objection to the law based upon the fact that other kinds of business are not similarly taxed. Apportionment of taxation is purely a legislative function.

3. It is urged that the tax is void as a local tax because the municipalities have no voice in its levy and collection. In support of this objection decisions are cited in which this court affirmed the right of the municipalities to choose their own local officers, and to decide for themselves whether they would burden their property with taxes for mere local conveniences in which the people of the State at large had no interest. Those decisions were made in cases in which the municipality was objecting to unusual legislation which proposed to subject it to extraordinary burdens. There is nothing of the like nature here. The municipality is not complaining, and the legislation proposes to make its burdens lighter, instead of heavier. The complaint, if any local rights are invaded,

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comes from a wrong source. The city ought to be here showing cause why she should be compelled to receive the tax, instead of these complainants showing cause why they should not pay it over to the city. When the city of Detroit shall object to having the money thrust upon her, it will be time enough to inquire whether any of her privileges are taken away by the law ; at present it is sufficient to say, that parties whose interests are directly antagonistic to those of the city in regard to the particular matter in controversy are not to be heard objecting on her behalf that the rights of the city are violated by the collection of a tax for her use. But it cannot escape even the most casual observation, that the purpose of this legislation, so far as it involves local rights, is directly the opposite to that which was held inadmissible in *People v. Hurlbut*, 24 Mich. 44, and *Park Commissioners v. Common Council of Detroit*, 28 id. 228. The legislation which came under consideration in those cases was designed to eventuate in taxation of the people of Detroit against their opposition ; this only provides for a general tax, which so far as it is collected within any particular locality, is handed over to the local authorities and credited to the local contingent fund. As a part of that fund it will be put to such purposes as the local authorities may agree upon, and presumptively these will be the general purposes of local government. The law therefore favors the localities, instead of forcing unusual burdens upon them.

4. It is objected that the sheriff is made the collector of township, village and city taxes under this law, when by right that duty, and the fees which are given for its performance, belong to the township, village or city collector, or treasurer. This objection, like the last, comes from the wrong source. Those on whose behalf it is made are not here as parties, and we are not aware that they complain. The parties taxed are the persons who manifest this decided interest in the constitutional emoluments of the office of collector, and not those who are said to be entitled to the fees. If the objection were a valid one, it is not clear that it could invalidate the tax ; it might only raise the question of the right of a particular officer to collect it. It is certain that it could constitute no objection to the tax in equity ; for as between the town or city and the party taxed, the equity of the tax is not in the least affected by the circumstance that the wrong officer is deputed to collect it, if that constitutes the only valid objection. But we think the objection is without force, either at law or in equity. Admitting what these complainants insist upon, that the township and city collectors have a constitutional right to perform all the duties that belonged to their offices when the constitution was adopted, it does not follow that they are entitled to

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collect this tax. A constitutional right to perform the old duties cannot be extended to cover new duties merely because they happen to be of a similar nature. This law takes from the local officers nothing ; the complaint of it is that in providing for a new duty it confers it upon another officer instead of upon the township and city officers. In this there is nothing unusual. Sheriffs in many States are collectors of taxes, and in this State they have always in some contingencies been collectors. It is true that in collecting this tax the sheriff acts on behalf of the municipalities ; but so he does in any case where the tax warrant is delivered to him ; and so do the county treasurer and auditor-general in collecting taxes, for they collect the local taxes as well as those levied for State purposes. The whole tax system is something in which the State at large is concerned, and the rules by which it may be made to operate harmoniously cannot be rules so inflexible as not to yield to circumstances, when the legislature deems it essential.

But there is another consideration that is conclusive on this point. This objection, like the last, is supposed to find support in the reasoning of this court in *People v. Hurlbut*, 24 Mich. 44. *But in that case we took especial pains to show that for some purposes the townships, villages and cities of the State could not be permitted to act independently, but were and must be subject to compulsion by the State. The case of taxes for general purposes was specially instanced, and it was said the municipalities could not be left to collect these or to refuse to collect them at their own volition ; they must collect them, and they must sustain local government, whether willing to do so or not. To that extent every part of the State was concerned in the action of every other part, because disorder in one locality would derange more or less the whole system. In the previous case of *People v. Mahaney*, 13 Mich. 487, it had been decided that the State had power to take control of the police of the city ; and this was cited with approval in *People v. Hurlbut*, on the express ground that the police of the State and the preservation of order in every locality was matter of State concern, and not of mere local interest. It requires no argument to demonstrate this ; the effect upon the whole State of abrogating local government in a single city or township, and leaving every thing to disorder and to the unrestrained passions of bad men, would inevitably be pernicious beyond estimate.

Now the law under consideration, though having revenue for one object, has the police of the State for another. It was deemed important to adopt it as a matter of police regulation. The legislature saw fit not to leave it to the localities to enforce it or not at their option, and it is matter of reasonable inference that they refrain from doing so because

the refusal of a locality to enforce it would introduce disorder into the system. Whether that was the reason or not, they had, as we think, an unquestionable right to make all such provisions as they deemed essential to preclude the probability of the law being nullified in any quarter. If to accomplish this it was deemed essential to commit the execution of the law to county instead of municipal officers, we know of nothing to preclude it. There is certainly nothing in the previous decisions of this court that is inconsistent with this feature of the law.

5. The objection which appears to be principally relied upon is, that a tax on the traffic in liquors under this law is equivalent to a license of the traffic, and therefore comes directly in conflict with that provision of the Constitution which declares that "the legislature shall not pass any act authorizing the grant of license for the sale of ardent spirits or other intoxicating liquors."—Const., Art. IV, Sec. 47. In order to arrive at the exact meaning of this provision, and to show what the convention and the people had in view, and intended to accomplish in adopting it, no little industry has been expended in sifting the proceedings of the convention, and in bringing before us the expression of views by the different members of that body upon the subject of the liquor traffic. But one needs to give very little attention to the proceedings, in order to be convinced,—what in fact is a part of the public history of the time,—that members of the convention who expressed views leading to the same result in shaping the instrument to be submitted to the people, had objects in view which were totally different, and expected, or at least hoped, to accomplish wholly different ends by means of the provision finally agreed upon. The provision itself was experimental, and no one could safely predict the consequences; but while those who favored the total destruction of the traffic in ardent spirits hoped to accomplish that object by means of a prohibition of license, others, not willing to destroy the trade, regarded the inhibition of license as a removal of embarrassing restrictions and impediments. The provision agreed upon was not of itself a prohibition of the traffic, and upon this the most diverse views might be concentrated; but beyond this there was no harmony of purpose whatsoever. With license prohibited a broad field was still left for legislation, and each side might hope to obtain the advantage in that, and not to find the constitutional provision interpose any serious obstacle. For these reasons the proceedings of the Constitutional convention are as nearly as possible worthless for any purpose of giving aid in the construction of this provision; and we can only take it as it stands, and seek the meaning in the words employed to express it.

Does, then, a tax upon the traffic in liquors come within the condem-

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nation of this provision of the Constitution, as being equivalent to a license of the traffic? Is it the same in legal effect, or is it the same according to the popular understanding of the term "license"? This is the question that presents itself for decision on this branch of the case.

The popular understanding of the word "license" undoubtedly is, a permission to do something which without the license would not be allowable. This we are to suppose was the sense in which it was made use of in the Constitution. But this is also the legal meaning. "The object of a license," says Mr. Justice MANNING, "is to confer a right that does not exist without a license." *Chilvers v. People*, 11 Mich. 43, 49. Within this definition, a mere tax upon the traffic cannot be a license of the traffic, unless the tax confers some right to carry on the traffic which otherwise would not have existed. We do not understand that such is the case here. The very act which imposed this tax repealed the previous law, which forbade the traffic and declared it illegal. The trade then became lawful, whether taxed or not; and this law, in imposing the tax, did not declare the trade illegal in case the tax was not paid. So far as we can perceive, a failure to pay the tax no more renders the trade illegal than would a like failure of a farmer to pay the tax on his farm render its cultivation illegal. The State has imposed the tax in each case, and made such provision as has been deemed needful to insure its payment; but it has not seen fit to make the failure to pay a forfeiture of the right to pursue the calling. If the tax is paid, the traffic is lawful; but if not paid, the traffic is equally lawful. There is consequently nothing in the case that appears to be in the nature of a license. The State has provided for the taxation of a business which was found in existence, and the carrying on of which it no longer prohibits; and that is all.

But it is urged that by taxing the business the State recognizes its lawful character, sanctions its existence, and participates in its profits,—all of which is within the real intent of the prohibition of license. The lawfulness of the business, if by that we understand merely that it is no longer punishable, and is capable of constituting the basis of contracts, was undoubtedly recognized when the prohibitory law was repealed; but as the illegality of the traffic depended on that law, so its lawfulness now depends upon its repeal; the tax has nothing to do with it whatever. Now it is not claimed, so far as we are aware, that the repeal of the prohibitory law was incompetent; and if not, the mere recognition of the lawfulness of the traffic cannot make the tax law or any other law invalid. It is only the recognition of an existing and conceded fact, and the courts cannot, if they would, refuse to recognize it.

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The idea that the State lends it countenance to any particular traffic by taxing it seems to us to rest upon a very transparent fallacy. It certainly overlooks or disregards some ideas that must always underlie taxation. Taxes are not favors; they are burdens; they are necessary, it is true, to the existence of government, but they are not the less burdens, and are only submitted to because of the necessity. It is deemed advisable to make careful provision to preclude these burdens becoming needlessly oppressive; but it is conceded by all the authorities, that under some circumstances they may be carried to an extent that will be ruinous to individuals. It would be a remarkable proposition, under such circumstances, that a thing is sanctioned and countenanced by the government when this burden, which may prove disastrous, is imposed upon it, while, on the other hand, it is frowned upon and condemned when the burden is withheld. It is safe to predict that if such were the legal doctrine any citizen would prefer to be visited with the untaxed frowns of government rather than with those testimonials of approval which are represented by the demands of the tax gatherer.

It may be supposed that some idea of special protection is involved when a business is taxed; taxation and protection being reciprocal. If the tax upon any particular thing was the consideration for the protection given to the owner in respect to it, this might be so; but the maxim of reciprocity in taxation has no such meaning. No government ever undertakes to tax all it protects. If a government were to levy only poll taxes, it would not be on the idea that it was to protect only the persons of its citizens, leaving their property open to rapine and plunder. In this State our taxes are derived mainly from real estate; but it has never been suggested that real estate was entitled to special considerations in consequence. In Great Britain real estate pays a relatively insignificant portion of the taxes, although in the social and political state it is more important than all other property. As a general fact the United States has not taxed real property; and though during the recent rebellion it taxed most kinds of business for war purposes, the number of subjects taxed has been several times reduced by legislation since, and may reasonably be expected to be further reduced hereafter. But the business taxed is no more protected than the business not taxed; and the fisheries, which are favored by bounties, are as much protected as either. All this is only an apportionment of taxation by the selection of subjects which under all the circumstances it is deemed wise and politic to subject to the burden. Whether a person in respect to his property or his occupation falls within the category of taxables or not is immaterial as affecting his claim to protection from the government. It is enough for him that the

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government has selected for itself its own subjects for taxation, and prescribed its own rules. It is his liability to taxation at the will of the government that entitles him to protection, and not the circumstances of his being actually taxed. And the taxation of a thing may be, and often is when police purposes are had in view, a means of expressing disapproval instead of approbation of what is taxed.

There has undoubtedly been felt and expressed a strong sentimental objection to the doing of any thing by the State that even seemed to be a lending of its countenance to a business which the objectors regarded as an evil in itself; especially to the State participating in the profits of a pernicious trade. But the objection never found expression in laws forbidding the taxation of liquors or of the business of dealing in them. Indeed, in this State liquors have always been taxable as property; and so have been the implements by means of which forbidden games of chance have been carried on. Yet when the keeper of billiard tables is compelled to pay a tax, it can be no defense to him, either in law or in morals, that he is compelled to do so from the profits of an illegal business. To refuse to receive the tax under such circumstances would tend to encourage the business, instead of restraining it; and would not only be unwise because of exempting one man from his fair share of taxation, but also because it would tend to defeat the State policy which forbids games of chance and hazard. The idea that a thing is favored because it is taxed may be examined in the light of the practice of this State in some other particulars. It has always been the custom in apportioning taxes by valuation to make some discrimination based on reasons of public policy. As an illustration we may mention the case of property devoted to educational or charitable purposes, and which as a rule has been exempted from general taxation. The general belief has been, that the interests and welfare of the whole community would be best subserved by abstaining from any imposition of the burdens of government upon such property; and the legislature in apportioning the taxes has accepted this general belief and acted upon it. It has been done as a matter of favor and by way of encouragement; and yet if the argument against the tax in this case is sound, we do not see why the State should not have evidenced its approbation of educational and charitable institutions by taking special care that they should feel its burdens, while at the same time it stigmatized other things which were regarded as immoral or pernicious by refusing to permit them to appear on the tax roll. A tax roll might, undoubtedly, be made in this manner a roll of reputable names, or even a roll of honor, but how any sound public policy would be subserved by it must require considerable ingenuity to point out. It would assuredly

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not be such policy as States have usually acted upon. While in the selection of objects for taxation, revenue is to be considered and kept in view, it is impossible to exclude other considerations. In proposing a tax it might always be a question whether it should be imposed upon persons, or upon property by value, and if so, upon what property, or upon business; and if so, what kind of business, or whether it should not be a combination of all these. One method might be the easiest for the collection of the necessary revenue, but most injurious or unequal in its results; one might discourage industry and another encourage it; one might collect the tax from luxuries, and therefore fall mainly upon the rich, while another would collect it from necessities and be oppressive to the poor. The whole question would be quite as much one of policy as of necessity, and a legislator would be unfit for his office who did not look beyond the proposed tax to its probable results. This is especially true in every case where the tax has reference to police as well as revenue. A particular business may then be taxed while others are spared, not only because for any reason it can best bear the burden, but also because such surroundings attach themselves to the business taxed as to render the discouragement and discipline of heavy taxation wise and politic. In the few cases in which the right to do this has been denied on the ground of inequality, the courts have affirmed it as being beyond question. See *Durack's Appeal*, 62 Penn. St. 491, 494; *Fletcher v. Oliver*, 25 Ark. 289; *State v. Parker*, 32 N. J. 426, 431. The Federal government has gone to a great extent in the same direction, levying duties in some cases which in their results are prohibitory; and in the case of the State banks purposely taxing them out of existence. *Veazie Bank v. Fenno*, 8 Wall. 533. This case does not call for any expression of opinion upon legislation of that extreme character, for we have nothing in this law that goes beyond the ordinary legislation when it is enacted for the double purpose of revenue and regulation.

This State has never shown any disinclination to make things morally and legally wrong contribute to the public revenue when justice and good morals seemed to require it. If it were to act upon the idea of refusing to derive a revenue from such sources, it ought to decline to receive fines for criminal offenses with the same emphasis that it would refuse to collect a tax from an obnoxious business. If the tax is laid by way of discouragement or regulation, it has the same general object in view with the fine; not only as it affects the person taxed and the community, but also in the use to which the money is devoted. Yet the Constitution expressly provides for a library fund to be derived from the violations of the public law (Constitution, Art. XIII, § 12), a provision that may

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as legitimately be said to be a license of crime, as a tax on a traffic may be said to be a license of the traffic.

Taxes upon business are usually collected in the form of license fees; and this may possibly have lead to the idea that seems to have prevailed in some quarters, that a tax implied a license. But there is no necessary connection whatever between them. A business may be licensed and yet not taxed, or it may be taxed and yet not licensed. And so far is the tax from being necessarily a license, that provision is frequently made by law for the taxation of a business that is carried on under a license existing independent of the tax.

Such is the case where cities, under proper legislative authority, tax occupations which are carried on under licenses from the State. *Ould v. Richmond*, 23 Gratt. 464; *Napier v. Hodges*, 31 Texas, 287; *Cuthbert v. Conly*, 32 Ga. 211; *Wendover v. Lexington*, 15 B. Monr. 258; see, also, *Home Ins. Co. v. Augusta*, 50 Ga. 580. The license confers a privilege, but it is not perceived why a privilege thus conferred should not be taxed as much as any other. The Federal laws give us illustration of the taxation of illegal traffic. A case in point was that of the taxation of the liquor traffic in this State previous to the repeal of the prohibitory law; the Federal law found a business in existence and it taxed it without undertaking to give it any protection whatever. *McGuire v. Com.*, 3 Wall. 387; *Pervear v. Com.*, 5 id. 475. What would have prevented the State from taxing the same traffic at the same time? Is it any more restricted in the selection of subjects of taxation than the general government is? If one may tax and at the same time refuse to protect may not the other do the same? The only reason suggested for a negative reply to these questions is, that it was the State itself, not the United States, that made the business illegal, and it would be inconsistent and absurd to declare it illegal and at the same time tax it. But how the inconsistency would appear in one case rather than the other is not apparent. The illegality was declared by competent authority, and yet the Federal government taxed the trade, at the same time refusing, or being unable to protect it. If protection because of the tax was due to the very thing upon which the tax was imposed, there would be an inconsistency in taxing a prohibited trade; but treating taxation, however and wherever it may fall, as the return for the general benefits of government,—for the protection of life, liberty, the social and family relations, as well as to business and property,—which is the only legal and proper idea of taxation, there is no inconsistency whatever in making a thing which is not protected one of the measures or standards by which to determine how much the party owning or supporting it ought to pay to

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the government. If one puts the government to special inconvenience and cost by keeping up a prohibited traffic or maintaining a nuisance, the fact is a reason for discriminating in taxation against him; and if the tax is imposed on the thing which is prohibited, or which constitutes the nuisance, the tax law, instead of being inconsistent with the law declaring the illegality, is in entire harmony with its general purpose and may sometimes be even more effectual. Certainly, whatever discriminations are made in taxation ought to be in the direction of making the heaviest burdens fall upon those things which are obnoxious to the public interests, wherever that is practicable.

For these reasons we think the objections which have been made to the law have no validity.

The decree of the Superior Court dismissing the bill will be affirmed, with costs.

The other justices concurred.

ELLIOTT v. VAN BUREN.

(33 Mich. 49.)

Evidence — amount required in civil actions involving criminal acts.

In an action for an assault and battery with attempt to ravish, *held*, that plaintiff was not required to prove the charge beyond a reasonable doubt; a preponderance of evidence was sufficient.*

ACTION for assault and battery. The opinion states the case.

Dart & Shields and *D. Johnson*, for plaintiff in error.

H. B. Carpenter & M. V. Montgomery, for defendant in error.

CAMPBELL, J. Emma Van Buren sued Richard Elliott for an assault and battery, one count of the declaration averring an attempt to ravish. The chief bodily damage shown on the trial consisted of bruises and injuries creating bodily weakness, and the aggravation of a malady accompanied with fits. The jury rendered a verdict of five thousand dollars.

* See *Kane v. Hibernia Ins. Co.*, ante, p. 400; also *Jones v. Greaves*, post.

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Errors are alleged upon various rulings during the trial, and in the charge to the jury.

The course of the argument renders it proper to refer briefly to some preliminary considerations.

This action is nothing more than trespass for an assault and battery. There is no such thing as a private action for a crime as such. The civil grievance here charged was an assault, described, as was proper, with its attendant circumstances of enormity, including an attempt to ravish. This, however, does not make it differ from an action for a lighter grievance, except as showing a heavier ground of complaint, for which, if made out, the damages allowed would be likely to be larger. The assault could be shown under either count, and if the whole circumstances of enormity were not made out, this would not defeat the action, but would only bear on the amount recovered. There is no rule of evidence which requires a greater preponderance of proof to authorize a verdict in one civil action than in another, by reason of the peculiar questions involved. *Watkins v. Wallace*, 19 Mich. 57. The doctrine of this case has been adhered to in this State, and the court rightly refused to direct the jury that they could find no verdict upon the main charge, unless on proof of the nature and degree required on an indictment for an attempt to commit the crime of rape; that is to say, in other words, they must be convinced beyond a reasonable doubt. Indeed, if such a direction would have been proper at all, it would have been applicable to the whole case; for a common assault has always been indictable, and an attempt to commit a felony was only a misdemeanor at common law, and the rule of reasonable doubt is not confined to felonies. No doubt a jury will always feel disposed to scrutinize an infamous charge more closely than a trifling one, and will not convict without being well satisfied, but there is no rule of law which adopts any sliding scale of belief in civil controversies.

We are also compelled to remark that it is not in the province of an appellate court to consider the amount of the verdict, or the weight of the evidence. The court of trial may set aside a verdict which violates justice, and it is to that tribunal that parties must apply for relief against excessive damages, or any other of the wrongs for which it may be right to grant a new trial. We are bound in all cases to assume that the jury have done no legal wrong when acting within their province. If the court below has committed no legal error, we can only affirm the judgment.

[The other errors assigned were not important.]

Judgment affirmed.

The Mayor, etc., of Niles v. Muzzy.

THE MAYOR, ETC., OF NILES V. MUZZY.

(33 Mich. 61.)

Municipal officers — right to recover for services outside of their official duties.

The mayor of a city, who was a lawyer by profession, was, without collusion or fraud, employed under a resolution of the common council to appear for the city and defend a suit against it. *Held*, that the employment was valid, and that he could recover the value of his services.

ACTION to recover for services. The opinion states the case.

Edward Bacon, for plaintiff in error.

W. J. Gilbert, for defendant in error.

PER CURIAM. Muzzy being an attorney and counselor at law and in chancery, and having been elected mayor of Niles, and in virtue of which office he was one of the common council, he was employed under a resolution of the common council to appear and defend the city in a suit in chancery brought against it by one Young in the Federal court at Detroit. In pursuance of such employment he appeared for the city in his professional character and rendered services which the court found to be worth one hundred dollars. The court below gave judgment in his favor for that sum with interest. Having rendered these valuable professional services, it is now objected that he ought not to be paid for them because he was mayor and councilman. There is no question open in regard to their worth to the city, or as to the necessity there was for them. Every such consideration is closed by the finding. Neither his duty as mayor, or as councilman, or as both, included any such service. He was no more required, in consequence of his official position, to employ his time and talents as a counselor at law in conducting a suit brought against the city, than he was to pay the debts of the city out of his own private funds. There may have been, and probably was, substantial reason for thinking his services in the case would be particularly useful to the city, and if such was the case, we see no cause for saying that the city was obliged to forego his professional assistance unless he would give it for nothing. When a case shall be presented showing fraudulent or collusive conduct on the part of one so situated, or between one so situated and other municipal officials, there will be room for different considerations. The finding fairly excludes the ex-

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istence of any thing of that kind here, and shows that his specific services were sought by the city and given by him; that they were meritorious and actually worth to the city when rendered the sum mentioned.

The judgment must be affirmed, with costs.

VILLAGE OF ST. JOHNS V. MCFARLAN.

(88 Mich. 72.)

Municipal corporation — fire limits — erection within — equity will not restrain.

A court of equity has no jurisdiction to restrain the erection of a wooden building within the fire limits of a municipal corporation, although such erection is prohibited by ordinance.

BILL in Equity to restrain the erection of a certain building. The opinion states the case.

R. Strickland, for complainant.

Spaulding & Oranson, for defendant.

MARSTON, J. The complainant filed its bill to restrain defendant from erecting a wooden building within certain established fire limits contrary to the provisions of an ordinance, a copy of which as set forth in the bill was as follows: "No. 1. The board of trustees of the village of St. Johns ordain, that there shall not be built, enlarged or placed upon any lot or part of a lot fronting on Clinton avenue, between Railroad and State streets, any wooden or wooden roofed building." The answer admitted that a resolution which the board of trustees termed an ordinance had been adopted, and there was no proof introduced on the subject, the case being permitted to stand in this respect upon the statement in the bill as admitted in the answer.

A court in chancery has no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done, if carried out, would be a nuisance. If it were otherwise, the court might be called upon in all classes of cases to restrain the doing of acts prohibited by statute. *Mayor, etc., v. Thorne*, 7 Paige, 261; *Att'y.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. 371.

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The erection of a wooden building within the limits of a city or village is not in and of itself a nuisance. Neither does the fact that the erection of such is prohibited by ordinance make it a nuisance. If this were so, then the doing of any act prohibited by law would, upon the same reasoning, be a nuisance. The act, if prohibited, would be illegal; but something more than mere illegality is required to give this court jurisdiction. It was, however, insisted that the erection of a wooden building in a thickly settled portion of a village increases the danger in case of fire, and thereby injures adjoining property. There are, however, many kinds of trades and occupations, some of them prohibited by law, which, when carried on, equally tend to injure adjoining property, yet no one would contend that a court of chancery should interfere by injunction. It was also claimed that if the relief prayed for was refused there was no other adequate remedy, and that therefore the court ought to grant relief. This may be true under the ordinance set forth. That the legislature, however, can give the village power to establish fire limits and enforce obedience thereto was not denied, and could not well be. If a proper ordinance was framed with an appropriate penalty for all violations of its provisions, we think the remedy at law would be found adequate. The fact that the remedy was not adequate in this particular case, on account of the ordinance not being sufficiently stringent in its provisions, cannot give this court jurisdiction to interfere.

The decree of the court below **must be affirmed, with costs.**

The other justices concurred.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

O'CONNELL v. THE CITY OF LEWISTON.

(65 Me. 34.)

Sunday — travel on — injury from defective way.

A person walked about a mile, in a town, on Sunday for exercise. *Held*, not a traveler in such a sense as to bar her recovery against the town for injuries suffered during such walk from a defect in the highway.

ACTION on the case for an injury occasioned to plaintiff's hand by a defect in defendant's highway. The plaintiff's evidence showed that on Sunday, March 22, 1874, she went from her home to her aunt's house, about one-fourth of a mile distant, to get her cousin to go to walk with her; that she and her cousin went out to walk and walked down Bridge street; that while they were going down said street her said cousin stepped upon the end of a loose plank in the sidewalk, which so raised the other end nearest the plaintiff that she hit her toe against it and fell, receiving the injuries complained of; that the distance walked was about a mile, and that the walk was for exercise solely.

The defendants requested the presiding judge to instruct the jury that traveling on Sunday except from necessity or charity is prohibited by law; that the presumption of law is that traveling on the Lord's day is unlawful; that in order for a person to recover damages for an injury sustained while traveling on the Lord's day it is incumbent upon such person to satisfy the jury that the traveling was from necessity or charity; that walking out upon the street or sidewalk in company with

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an invited friend for the purpose of recreation, a walk or pleasure, is not an act of necessity or charity and is not authorized by law ; and, that if the plaintiff was thus walking and received the injury complained of from the alleged defective sidewalk, she cannot recover from the city bound by law to keep the sidewalk in repair.

These instructions were refused ; but the judge instructed the jury that traveling for the purpose of making a call or visit of pleasure would be unlawful ; that a distinction was raised not very obvious but sustained by law ; that while traveling for the purpose of making a visit to a friend merely for the purpose of spending the evening in company, was not lawful, traveling on Sunday for the purpose of exercise, gentle exercise in the open air, intending to make no call at any house, but, after taking the walk, returning home, would not be unlawful ; that the distinction was, in one case the traveling was for visiting. and in the other, for no such purpose, but simply a walk in the open air without any object of pleasure.

There was no other evidence relating to the traveling or its purposes, or the cause of the injury. The plea was the general issue. The verdict was for the plaintiff for \$1,800.

The defendants excepted.

M. T. Ludden, city solicitor, for defendants.

L. H. Hutchinson & A. R. Savage, for plaintiff.

VIRGIN, J. The decision of this case involves the interpretation of R. S., ch. 18, §§ 40 and 65, defining the liability of towns for injuries received through their defective ways, viewed in connection with that of ch. 124, § 20, prohibiting traveling on the Lord's day.

The first section mentioned requires towns to open and keep their ways "safe and convenient for travelers ;" and there is no provision requiring ways to be kept thus for any persons other than "travelers." This being the extent of the provision is the full measure of liability. *Peck v. Ellsworth*, 36 Me. 393.

Section 65 providing a remedy for "any person" injured "through any defect or want of repair" in any public way, relates to those only for whom ways are established, to wit, "travelers." *Stinson v. Gardiner*, 42 Me. 248 ; *Leslie v. Lewiston*, 62 id. 468.

In general terms, ways are established and constructed at the public expense for the accommodation of all persons who in performing the duties, or prosecuting the general pursuits of life whether of business or

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pleasure, have occasion to pass and repass along and upon them on foot, with horses and carriages, or with teams for the transportation of property. And persons thus using a public way are "travelers" within this statute, and are entitled to the remedies therein provided. When, however, they cease to use it for the substantial purposes for which it is established and appropriate it to uses foreign thereto, they can no longer claim to be "travelers" or be entitled to the remedies provided in behalf of "travelers." This principle is illustrated by numerous familiar decisions which need not be cited here.

Can a person recover for an injury received through a defect in a way while traveling in violation of the Lord's day statute? This question has been repeatedly decided in the negative in this and several other States, while other courts of acknowledged learning and ability have arrived at the opposite conclusion.

Was the plaintiff, at the time of receiving the injury complained of, traveling in violation of ch. 124, § 20, which provides: "whoever, on the Lord's day, . . . travels, or does any work, labor or business on that day, except works of necessity or charity, . . . shall be punished by fine," etc.?

It is evident that the answer depends to a great extent on the meaning which the legislature intended to give to the word "travels" in this statute. For if the idea of traveling is precisely the same in the two statutes—if the term "traveler" as used in both are synonymous, then the plaintiff was violating the penal statute when she was injured, and cannot recover therefor, unless she was within the excepting clause.

Although a particular word or phrase is generally used in one and the same sense as often as it occurs in the same chapter, the provisions of which pertain to the same general subject-matter, it does not follow that it is to receive the same interpretation in a penal as in a remedial statute. That every passing along and upon a highway under ch. 18 which constitutes traveling as there used and entitles the traveler to a remedy therefor provided for an injury received, does not, if done on Sunday, necessarily constitute a traveling within the provisions of ch. 124, becomes evident, from various considerations.

In construing the statute of ways, the decisions have never recognized any distinction between walking from place to place in town, and walking or riding from town to town. But such a distinction is apparent in ch. 124 as will be seen by comparing sections 20 and 21. Thus § 21 forbids any innholder or victualer, on the Lord's day, to suffer "any persons, except travelers, strangers or lodgers, to abide in his house," etc. If, however, every person who walks in the street from place to place in

the town "travels," within § 20, he would also thereby become a "traveler" within § 21 and the phrase "except travelers" would become a nullity as all would be "travelers" who happened into the inn. That such was not the original intention of the legislature is rendered still more apparent by regarding the language of the statute of 1821, ch. 9, § 3 (from which § 21 of ch. 124 was derived), which forbade innholders and others there enumerated to "entertain any of the inhabitants of the respective towns where they dwelt, or others not being travelers," etc. This language would seem to make it certain that the citizens of a town when visiting an inn and certain other places of entertainment kept therein, were not considered "travelers."

Moreover, the numerous provincial statutes on this subject enacted in Massachusetts, from time to time from its earliest times down to 1791, not only contained provisions prohibiting traveling strictly so called, but they also, by distinct and variously expressed clauses, forbade under specific penalties, "unnecessary walking in the streets, highways, fields," etc. But this last and all similar provisions were omitted from the Mass. Stat. of 1791 and all succeeding statutes in that Commonwealth. And "it is reasonable to infer that the provisions against mere unnecessary walking in the streets were intentionally omitted in the legislature, and for the reason that they were an unwise and arbitrary interference with the comfort and conduct of individuals." *Hamilton v. Boston*, 14 Allen, 481. Before the separation, the laws of Massachusetts were our laws. After becoming a State, our earliest statute providing for the "due observation of the Lord's day" (Stat. 1821, ch. 9), was substantially a transcript of that of 1791, ch. 58, except as to its penalties; and section 1 provided, "No traveler, drover, wagoner, teamster, or any of their servants, shall travel on the Lord's day, except from necessity or charity." The only substantial difference between that and the present statute is a substitution of "whoever" for the different classes specified in the other. The effect of the change simply enlarges the number of persons to whom the statute may apply, but it in no wise changes the act by which they may incur the penalty, the word "travel" remaining.

Our conclusion is that a young lady, who, on the Lord's day, walks one-fourth of a mile to her aunt's house and calls there and invites her cousin to walk with her, and they then proceed to walk three-fourths of a mile simply for exercise in the open air, is not thereby traveling in violation of R. S., ch. 124, § 20.

This decision has the authority of the court in Massachusetts after a complete review and thorough analysis of the statutes. *Hamilton v. Boston*, 14 Allen, 475.

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If the testimony is true, the verdict is not against the weight of evidence or against law.

Motions and exceptions overruled. Judgment on the verdict.

APPLETON, C. J., WALTON, BARROWS and PETERS, JJ., concurred.

DOHERTY V. DOLAN.

(65 Me. 87.)

Damages — on breach of contract to convey land.

In an action for breach of an agreement to convey land, *held*, that the measure of damage was the value of the land at the time of the breach, less so much of the price as remained unpaid, with interest thereon; and this whether the breach was willful or through defendant's inability to convey; but that the plaintiff had his election to rescind the contract and recover the amount paid, with interest, as money had and received.

ACTION on the case for damages for a breach of contract to convey land.

The plaintiff had paid \$1,000 at the time the contract was made, and agreed to pay the balance, \$9,250, upon receipt of the deed.

There was evidence tending to show that the property was incumbered, and the defendant thereby unable to give a clear title thereto, that the plaintiff offered to pay the defendant the purchase-money due by the terms of the memorandum before the suit was brought, and that the property was worth \$10,000.

Upon the question of damages, the presiding justice instructed the jury as follows: "I instruct you for the purpose of this case that the plaintiff, if entitled to recover at all, is entitled to recover the \$1,000, which it is admitted he paid toward the purchase-money of this property. It is entirely unnecessary to consider the other elements of damage, such as loss of time and loss of interest, because the whole claim of the plaintiff here for damages is \$1,000. He fixed his claim for that in his writ, and cannot in any event recover more than that."

The defendant, the verdict being for the plaintiff for \$1,000, alleged exceptions.

T. H. Haskell, for defendant.

M. P. Frank, for plaintiff.

PETERS, J. The defendant contends that the election as to the time when a deed was to be made out was with him. If that is so, he has \$1,000 of the money of the plaintiff prepaid to him, which he can keep as long as he pleases, and never make the deed. The implication from the argument is, that a deed is to be delivered within some time, and that must be a reasonable time. In this ruling the court was right.

In another respect, however, we think an error was committed at the trial. The judge should have ruled, that the plaintiff could recover as damages what the land was worth at the time the defendant should have furnished the deed, less so much of the consideration agreed to be given for it, as remained unpaid. That could not exceed \$1,000, as no more was claimed in the writ. But it might be less. If the value of the property was but \$10,000, then the damages under this rule would have been but \$750, while the direction was peremptory that the damages should be \$1,000, if the plaintiff could recover at all. Herein the learned judge erred.

The action is based upon the contract, setting out that it had been broken upon the part of the defendant. It is not a suit for the consideration paid, but a suit for the damages necessarily resulting to the plaintiff, because the defendant had refused to convey. The general rule of damages in this form of action is well settled. If the plaintiff had paid nothing down, and the land was worth at the date of the breach more than he was to give for it, the difference would be his profit, and he could recover that amount. If there was no difference between the contract price and the value of the land, when it should have been conveyed, and nothing was paid, then his damages would be nominal only; or if, in such case, the land was worth less than the contract price, he would then have nominal damages for the technical breach. So, if the plaintiff had paid the contract price in full, he could recover the value of the land at the time it should have been conveyed to him, whether the value was then more or less than the contract price. And so it logically follows, there being a part payment, and the land worth less than the contract price at the time a conveyance should have been made, that the damages recoverable would be what the land was then worth, less the amount of the price paid for it that remained unpaid. By paying the full price, the vendee is entitled to the land or its value, whatever the value may be. The recovery of damages, according to these rules, puts him in as good condition as if the contract had been performed. He gets exact indemnity. *Warren v. Wheeler*, 21 Me. 484; *Hill v. Hobart*, 16 id. 164; *Robinson v. Heard*, 15 id. 296; *Russell v. Copeland*, 30 id. 332; *Lawrence v. Chase*, 54 id. 196.

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The plaintiff, however, while he admits that this is a correct statement of the general rule, in cases where a vendor refuses to convey to the vendee when he has the power to do so, contends, that a different rule prevails in cases where the vendor, through unanticipated causes which he cannot control, although acting in good faith, is unable to convey; contending that in such case the measure of damages is the amount of consideration actually paid and interest thereon. If this position is a correct one, the verdict should stand.

This rule, as contended for by the plaintiff, is undoubtedly the established law of the English courts. Many of the American State courts have adopted it. It prevails in New York, although much doubt of its correctness has been expressed by individual members of the courts of that State. See remarks of DENIO, J., in *Conger v. Weaver*, 20 N. Y. 140; of MASON, J., in *Pumpelly v. Phelps*, 40 id. 59; see also, S. C., *sub nomine*, *Brinckerhoff v. Phelps*, 24 Barb. 100. The Supreme Court of the United States does not sustain the doctrine. *Hopkins v. Lee*, 6 Wheat. 109. In Sedgwick on Damages (6th Ed.), 218, after reviewing many English and American cases, it is by the author strongly disapproved. We do not discover that the precise point, namely, whether the measure of damages depends at all upon the cause of the failure to convey, has ever been noticed in any reported case in our own State. Still it can hardly be regarded here as a new question. We think it is virtually settled by decisions in analogous cases. In the case of personal property, the measure of damages has uniformly been based, in this State, upon the value of the articles when they should have been delivered, and not upon the consideration paid therefor. *Smith v. Berry*, 18 Me. 122; *Furlong v. Polleys*, 30 id. 491; *Berry v. Dwinel*, 44 id. 255; *Bush v. Holmes*, 53 id. 417.

The reason assigned in the New York cases (and in cases elsewhere) for the adoption of the rule there adopted, is the analogy that is claimed to exist between actions for the breach of a covenant to convey land, and actions for the breach of a covenant for the quiet enjoyment of land and for warranty of title. *Baldwin v. Munn*, 2 Wend. 399; *Peters v. McKeon*, 4 Denio, 546. But that can be no argument for the doctrine here, but conclusive argument against it, inasmuch as, while the rule of damages in those courts, under the covenants of quiet enjoyment and warranty of title, is the consideration paid for the land and interest, the measure in this State is the value of the land at the time of eviction. *Hardy v. Nelson*, 27 Me. 525; *Elder v. True*, 32 id. 104, and cases there cited. Still it is not to be admitted that a complete similitude exists between the two classes of covenants, in their legal bearing and

effect. There is less harshness in applying our rule to contracts to convey, than to the case of covenants in deeds. Improvements are not so likely to be made upon the land in the former as in the latter case by the person in possession. The correctness of the comparison is questioned in the opinion of the majority of the court in *Pumpelly v. Phelps*, *vide supra*.

We think the rule that we are disposed to adhere to, as adapted to all cases, a reasonable one. The pecuniary damages are the same to the vendee, whether the motive of the vendor in refusing to convey is good or bad. It is a difficult thing to ascertain whether or not a vendor is actuated by good faith in his refusal to convey. There can easily be frauds and deceptions about it. The vendor is strongly tempted to avoid his agreement, where there has been a rise in the value of the property. The vendee, by making this contract, may lose other opportunities of making profitable investments. The vendor knows, when he contracts, his ability to convey a title, and the vendee ordinarily does not. The vendor can provide in his contract against such a contingency as an unexpected inability to convey. He can also liquidate the damages by agreement. The measure of relief, afforded by our rule, is a fixed and definite thing. The other rule is not easily applied to all cases, and the books are burdened with discussions and refinements in relation to the modifications and restrictions and qualifications which, in different jurisdictions, have been annexed to it. See notes to Sedgwick on Damages, before cited.

But the ruling would have been right in this case had the action been for money had and received, and it could have been made so by amendment. The declaration is somewhat in the nature of a general count, as it is, although not strictly and technically such. The cause was tried in the same manner and upon the same proofs as if the writ contained the money counts. If it had contained them, the plaintiff would have been entitled to recover the \$1,000 paid by him and interest on it, upon the ground that, by the institution of the suit, the contract was by him rescinded. He had a right to rescind. The defendant did not keep his contract. His failure was a total one. For that reason it is clear, upon the authorities, that the money paid was recoverable back. *Keys v. Harwood*, 2 C. B. 905; *Planche v. Colburn*, 8 Bing. 14; *Miner v. Bradley*, 22 Pick. 457; *Canada v. Canada*, 6 Cush. 15; *Appleton v. Chase*, 19 Me. 74; *Wright v. Haskell*, 45 Me. 489; *Parsons on Contracts*, vol. 2, p. 191; *Lawrence v. Taylor*, 5 Hill, 107; *Reddington v. Henry*, 48 N. H. 273; *Loder v. Kekule*, 91 E. C. L. 128.

We think it would best accord with justice to the parties to allow the verdict to stand, if the plaintiff desires it, upon terms.

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Therefore, we advise the court below to permit an amendment of the declaration, by the substitution of a count for money had and received, in lieu of the present count, upon the condition that the plaintiff shall recover no costs in the action, and the defendant none.

If this is done, the exceptions to be overruled ; otherwise to be sustained.

APPLETON, C. J., WALTON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

PORTLAND V. BANGOR.

(65 Me. 120.)

Constitutional law — Fourteenth Amendment of the Federal Constitution — depriving paupers of liberty without due process of law.

A State statute authorized two overseers of the poor in any town, by writing under their hand, to commit paupers and vagrants to the work-house. *Held* in violation of the Fourteenth amendment to the Constitution of the United States, as it deprived a person of liberty without due process of law.

ACTION of assumpsit to recover the value of supplies to a pauper. Harriet S. Ray, the alleged pauper, was committed to the Portland work-house in 1871, under a warrant signed by two overseers of the poor, on an *ex parte* hearing, on the ground that she was an able-bodied, dissolute vagrant, exercising no lawful business and liable to become chargeable to the city. This action was brought for her board while in the work-house for two months ending September 17, 1871, at \$2.50 per week. The verdict was for the plaintiffs for \$24.49 ; the defendants filed a motion to have it set aside, as against law and evidence.

A. G. Wakefield, city solicitor, for defendants.

T. B. Reed, city solicitor, for plaintiffs, relied upon *Angeline Nott's case*, 11 Me. 208, and *Portland v. Bangor*, 42 id. 403.

WALTON, J. It was decided in *Angeline G. Nott's case*, 11 Me. 208, that the statute of this State which declares that two or more overseers of the poor of any town or city may, by a writing under their hands, commit to the work-house, "all persons able of body to work, and not having estate or means otherwise to maintain themselves, who

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refuse or neglect so to do, and all such as live a dissolute, vagrant life, and exercise no ordinary calling or lawful business sufficient to gain an honest livelihood ; and all such as spend their time and property in public houses to the neglect of their proper business," violates no provision of our State Constitution ; and, in *Portland v. Bangor*, 42 Me. 403, that the expenses thus incurred for the support of either of these classes of persons while thus confined in the work-house are, in contemplation of law, pauper supplies, and may be sued for and recovered as such of the town or city where such persons have their settlements.

If such an arbitrary exercise of power violates no provision of our State Constitution, it very clearly violates the fourteenth amendment of the Federal Constitution. That article declares that no State shall deprive any person of life, *liberty*, or property, without due process of law ; and while it may not be easy to determine in advance what will in every case constitute due process of law, it needs no argument to prove that an *ex parte* determination of two overseers of the poor is not such process. *Dunn v. Burleigh*, 62 Me. 24.

If white men and women may be thus summarily disposed of at the north, of course black ones may be disposed of in the same way at the south ; and thus the very evil which it was particularly the object of the fourteenth amendment to eradicate will still exist.

The objection to such a proceeding does not lie in the fact that the persons named may be restrained of their liberty, but in allowing it to be done without first having a judicial investigation to ascertain whether the charges made against them are true. Not in committing them to the work-house, but in doing it without first giving them an opportunity to be heard.

If the decisions in *Nott's case*, and in *Portland v. Bangor*, above cited, were correct when made, the power therein sanctioned can be exercised no longer. It is abrogated by the fourteenth amendment of the Federal Constitution ; and was at the time when the proceedings on which this action is founded were had. The proceedings being illegal, the action cannot be maintained. The verdict upon the undisputed facts of the case is contrary to law. It must therefore be set aside.

Motion sustained. Verdict set aside. New trial granted.

APPLETON, C. J., BARROWS, DANFORTH, VIRGIN and PETERS, JJ., concurred.

McLeery v. McLeery.

MCLEERY v. MCLEERY.

(65 Me. 172.)

Dower — two dowers in same estate — conveyance in fee to dowress — estoppel — merger.

A widow, entitled to dower in land, accepted from the heir a conveyance in fee of the land with warranty and entered into possession. The heir dying, his widow brought action of dower against the first widow. *Held*, (1) that the second widow was dowable only out of two-thirds of the land; (2) that the first widow was not estopped to claim dower by the covenants of warranty in the deed to her, and (3) that being in possession and in the same condition as if dower had been assigned, her dower was not merged by the conveyance.

ACTION of dower. The opinion states the case except as to the "paper given by the sons to the mother" mentioned in the opinion, which was a promise or agreement by the sons in consideration of their having the income of the whole estate that the widow should have the occupancy of certain premises and a certain annual allowance.

S. Belcher, for plaintiff.

P. H. Stubbs, for defendant.

PETERS, J. Wm. McLeery was seized of the messuage described in the writ. At his death, the tenant, who is his widow, became entitled to dower in it. Subject to her right of dower, the estate descended to his two sons. One of the sons, the husband of the defendant, acquired his brother's interest in the estate, thus owning the whole. At his death, his widow also became entitled to dower. Both husbands are dead, and their wives survive. Here, then, two widows are dowable in the same estate. Their respective rights were as follows: The tenant (wife of the father), having the elder title in dower, would have for her dower one-third of the whole. The demandant (wife of the son), being the younger widow, would have one-third of the remaining two-thirds of the estate. Thus, the tenant would have three-ninths, and the demandant two-ninths thereof. This result comes from the principle established in the familiar maxim of ancient origin, that "dower ought not to be sought from dower." Nor will the junior widow be dowable in the one-third that may be assigned to the senior widow, upon the death of the latter; and for this reason. In order to recover dower, she has to count upon her husband's seizin. But during his life-time he had no seizin of the one-third which goes to his mother as dower. When his mother's dower is assigned to her, she partakes seizin therein by

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relation from her husband, continuing his seizin, and to that extent defeating the seizin of the son, who in such one-third has only a reversion. Had the son received the title of the estate from his father by deed, and not by descent, the rule would be otherwise. In such case the son would have had a seizin in his life-time of the whole estate, sufficient to give his wife dower in the two-thirds during his mother's life-time, and in the whole estate when the mother's title to dower ceased. *Geer v. Hamblin*, N. H., stated in 1 Me. 54; *Brooks v. Everett*, 13 Allen, 457; 4 Kent's Com. 64. See also, under appropriate heads, Wash. Real Property and Scribner on Dower, for a more particular elucidation of the principles stated.

But the question arises, whether the demandant may not be dowable in the whole estate, instead of two-thirds thereof, upon the ground that the title of the elder widow to dower has been in some way extinguished or lost, and this is claimed by the demandant to be the case from several causes.

First. She contends that the paper given by the sons to the mother has that effect. And, upon the other hand, the tenant claims that her acceptance of the paper amounted to an assignment of her dower. But our opinion is that the agreement had neither the one effect nor the other. It neither assigned dower nor extinguished it. It was not an extinguishment of dower, because there is no release or conveyance under her hand or seal, nor does she in any way design or attempt to surrender her right. Nor could it operate as an assignment to her of her dower. A portion of the consideration to her in the agreement consists of the executory promises of the sons, which may never be fulfilled. The agreement (not signed by her) merely related to "the use and income" of her dower by the sons until set out to her. It operated only to suspend her claim for a time. *Sargent v. Roberts*, 34 Me. 135; *Austin v. Austin*, 50 id. 74.

Then a question arises, whether the demandant may not have dower in the whole estate until the dower of the tenant has actually been assigned to her. It is held by text-writers, and is so decided generally, that the maxim *dos de dote peti non debet* does not apply where there has not been an actual assignment to the first widow. This is upon the principle that the husband of the second widow may be considered as seized in his life-time of the estate charged with the right of dower of his mother, as against all others but her. A stranger cannot avail himself of the contingency that the first widow may never enforce her right. When she does enforce it, then an assignment already made to the second widow becomes wholly defeated or diminished thereby. *Dunham*

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v. Osborn, 1 Paige, 634; *Reynolds v. Reynolds*, 5 id. 160; *Safford v. Safford*, 7 id. 259. To the same effect are the cases cited *supra*. See also *Young v. Tarbell*, 37 Me. 509. But the answer to this position is, that the rule does not apply to this case. The tenant is not a stranger. She is in possession claiming her estate of dower. Her condition is the same essentially as if a special assignment had been made to her. There is no need of a separation of her estate in dower from her estate of inheritance, for any practical purposes. She does elect to enforce her claim, by a resistance to the claim of the second widow. If the demandant should recover according to her claim, the tenant might, perhaps, have an action against her to recover a part of it back again. We think the legal rights of the parties can be as well settled in the present action as in any other way.

Then it may be argued that the tenant's right of dower has been lost by consolidation with the fee conveyed to her by her son. In *Leavitt v. Lamprey*, 13 Pick. 382, it was decided that a second widow was not entitled to dower in the whole of an estate against the tenant to whom the senior widow had conveyed her right after she had recovered judgment for dower therein, but before it was set off to her. While in *Atwood v. Atwood*, 22 Pick. 283, it was held that a prior right of dower which had been released to the tenant before any suit to enforce the same could not be set up to diminish the claim of a second widow who claimed dower in the whole estate. But we have already expressed the opinion that in the case at bar the senior widow is in the same condition and bears the same relation with all parties interested as she would if her dower had in point of fact been set out to her. She is entitled to a life estate of one-third. She is in actual possession of it as well as of the reversion, and she is defending her possession. In this State the doctrine of merger is not favored in law or equity. It is clear enough that if this was a proceeding in equity a merger could not be regarded as taking effect. It is manifestly for the interest of the tenant to keep her two titles distinct, in order that the demandant may recover no greater amount of dower than she would have been entitled to if they had continued to be held by different persons. The tendency in the courts has been to admit the application of the same principle in proceedings at law, in cases where the forms of the transfers are such that it can reasonably be effectual. The tenant having all of the estate, including her right of dower therein, may certainly be regarded as having her estate of dower as effectually as if she had recovered judgment therefor. She cannot sue herself to obtain it. She has it. Having the whole estate, she has all the parts. *Campbell v. Knights*, 24 Me. 332; *Holden v. Pike*, id. 427; *Simonton*

W. Gray, 34 id. 50; *Strong v. Converse*, 8 Allen, 557; *Savage v. Hall*, 12 Gray, 363.

The point, however, upon which the demandant places the greatest reliance and stress is that the tenant is barred from her claim of dower, upon the technical ground of estoppel. It is contended that, by accepting from her son a deed of the premises with the usual covenants of warranty, she admitted that he was fully seized of all the premises as of fee, and the argument is, that she is now estopped to show the contrary. In support of this view, *Lewis v. Meserve*, 61 Me. 374, is cited for authority. The tenant, admitting *Lewis v. Meserve* to be correctly decided, denies that it can apply to a case like the one at bar. We think the distinction is well taken. That case was decided with exact correctness, having reference to the actual question then before the court for their determination. There it appeared that the tenant who resisted the claim of dower obtained *all* his title from the husband of the demandant, and there was no pretense that he had any kind or claim of title from anybody else. He merely set up that some one else might have a title paramount to his. But he had no relation with it, if it was so. The court were clearly of the opinion that he was estopped to deny the seizin of his own grantor, who was the husband of the demandant in that suit. All the cases are in accord as far as that case goes. The point is there briefly alluded to, the decision of it not being really necessary to the result of the case. But the present case is a different one. Here the tenant does claim a title of dower outside of and superior to the right and title of her grantor. She had no occasion to purchase what already belonged to her, nor is it to be supposed that there was any design by her to do so. Her grantor had already acknowledged and submitted to her superior claim. The reasonable presumption is that she paid for the premises, deducting from the price for the entire premises the value of what was already her own. It would seem hard and inequitable that the mere form of the instrument of conveyance should have the effect to deprive her of a valuable interest and right which she already possessed. Such a result was undoubtedly never dreamed of by the parties concerned when the conveyance was made. Nor does the law require it to be so. We are aware that there have been contrary decisions upon the point presented. Nor is there a satisfactory consistency upon it in the decisions of our own State. But we regard the opinion in the leading and important case of *Foster v. Dwinel*, 49 Me. 44, as a settlement of the question, so far as the rights of this tenant are concerned. That case has been much commended by several text-writers since it was promulgated, and believing that the arguments and conclusions of the court therein are

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based upon sound logic and good sense, we see no good reason why it should not be adhered to in a state of facts like those presented in the present case. Bigelow on Estoppel, 71 ; 2 Scribner on Dower, 227.

Judgment for demandant for her dower in two-thirds of the premises described in the writ.

APPLETON, C. J., WALTON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

CROOKER v. HOLMES.

(65 Me. 195.)

Negotiable instrument — indefinite time of payment — mortgage to secure note.

A promissory note was made "payable when I sell my place where I now live." *Held*, that the maker was bound to sell his place within a reasonable time and, failing in that, the note was due.

Seem, that a suit may be maintained to foreclose a mortgage given to secure a note, even though a recovery could not be had upon the note.

BILL in equity to redeem certain premises from its incumbrances thereon described in the opinion.

A. Black, for plaintiff.

A. A. Strout & G. F. Holmes, for defendant.

APPLETON, J. [After deciding unimportant questions]. III. It is claimed that the debt will never become payable, and can never be enforced.

The maker of the note promises to pay when he shall sell the place he lives on in Oxford, Maine. The debt is due *in presenti*. Its payment is postponed to a future time, but the debt none the less exists. The debt is absolute, the time of its payment indefinite.

In *De Wolfe v. French*, 51 Me. 420, this court decided that where a debt is due absolutely, and the happening of a future event is fixed upon as a convenient time for payment merely, and the future event does not happen as contemplated, the law implies a promise to pay within a reasonable time.

In *Sears v. Wright*, 24 Me. 278, where a note was payable "from the avails of the logs bought of M. M., when there is a sale made," it was held not payable upon a contingency but absolutely and when a reasonable time had elapsed to make sale of the logs, and that it was the duty of

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the maker to sell them. But whether it be logs to be sold or a farm can make no difference. The maker of the note is to make sale within a reasonable time to enable him to discharge his indebtedness.

If a party puts it out of his power to perform his contract, his liability at once accrues. It matters not whether by his neglect this be so, or whether it be intentional. The maker of a note by his indebtedness and suffering judgment and execution to issue against him and a levy to be made is not to be thereby permitted to defeat a debt justly due. It was the fault or neglect of the complainant's mortgagor that he was unable to sell his farm. Had he paid his debts, the sale of the equity would not have happened. But the complainant is not to suffer on that account.

Even though a recovery could not be had upon the note, it not being paid, it does not follow that the mortgagee could not maintain his suit. Where a note secured by mortgage is barred by the statute of limitations, yet if not paid a recovery may be had on the mortgage. *Thayer v. Mann*, 19 Pick. 535.

Bill sustained, with costs for the complainant, who is found entitled to redeem the mortgaged premises. A master is to be appointed to ascertain the amount due.

WALTON, BARROWS, DANFORTH, VIRGIN and PETERS, JJ., concurred.

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(65 Me. 234.)

Evidence — witness — defendant in criminal prosecution as witness in his own behalf — extent of examination.

The defendant in a criminal prosecution became a witness at his own request. *Held*, (1) that he thereby waived the constitutional provision that an accused person shall not be compelled to give evidence against himself; (2) that he could not refuse to answer questions put on cross-examination to discredit his direct evidence on the ground that answering would criminate himself, and (3) that privilege from answering questions on the ground that they tend to criminate the witness is the privilege of the witness and not of his counsel.*

COMPLAINT for selling intoxicating liquors.

The prosecution introduced evidence tending to prove the charge. The defendant was thereupon at his own request called as a witness in

* See *Commonwealth v. Nichols*, 19 Am. Rep. 346 and notes.

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his own behalf. He was on cross-examination questioned concerning other sales of intoxicating liquors made by himself personally. His counsel objected on the ground that witness was not obliged to answer concerning sales made prior to the sale charged; and that the waiver of his privilege to give no evidence tending to criminate himself applied only to the charge on trial. The court overruled the objections. A verdict was rendered for the State.

R. P. Tapley, for defendant.

W. F. Lunt, County Attorney, for State.

APPLETON, C. J. [After deciding some unimportant exceptions].

The evidence on the part of the government had made out a *prima facie* case against the defendant — a sale by his servant of his liquors in his shop.

The defendant might go on the stand as a witness or not. By the constitution, he could not “be compelled to furnish or give evidence against himself.” The privilege of exemption from criminative interrogation or cross-interrogation was guaranteed to him. But this privilege may be waived. By R. S., ch. 134, § 19, “in all criminal trials, the accused shall, at his own request, but not otherwise, be a competent witness.” The defendant at his own request became a competent witness, and thereby waived his constitutional privilege. He then subjected himself to the peril consequent upon a cross-examination as to all matters pertinent to the issue. *State v. Ober*, 52 N. H. 459; S. C., 13 Am. Rep. 88; *Com. v. Bonner*, 97 Mass. 587; *Com. v. Morgan*, 107 id. 199; *Connors v. The People*, 50 N. Y. 240. Claiming to be a witness in his own behalf “at his own request” he cannot have the privilege of self-exonerative testimony without incurring the dangers incident to discreditive or criminative cross-interrogation.

The defendant going upon the stand as a “competent witness” was inquired about as to certain sales made by him prior to the one charged in the complaint to which he made answers admitting prior sales by himself. The witness interposed no objection to answering the question, because the answer might be self-criminative, but the objection was taken by the counsel for the defendant and by him alone.

Now, if there is any thing well settled, it is that the privilege of exemption from answering interrogatories, which being answered truly would disclose the guilt of the person interrogated, is the privilege of the witness alone. It is granted because of crime and for its impunity, lost by means of and in consequence of the proof furnished by the

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answer the witness may hereafter be subjected to the punishment which the law has affixed to his criminal misconduct. It is the privilege of crime. The interests of justice would be little promoted by its enlargement. "The privilege," observes NELSON, C. J., in *Cloyes v. Thayer*, 3 Hill, 564, "belongs exclusively to the witness, who may take advantage of it or not at his pleasure. . . . The witness may waive it and testify, in spite of any objection coming from the party or his counsel." In *Ward v. The People*, 6 Hill, 144, the court held that the public prosecutor has no right in the trial of an indictment to object that a question put to one of the witnesses called for an answer tending to expose him to criminal punishment; this being an objection which the witness alone is authorized to make. So, in *State v. Foster*, 3 Fost. 348, it was to lay with the witness to claim the privilege or not as he may choose. It is obvious, that if the defendant is to be regarded, when testifying, only as a "competent witness," which is what the statute makes him, "at his own request and not otherwise," that the exemption from answering criminative cross-interrogation is personal and the witness alone can claim it. In *Brandon v. The People*, 42 N. Y. 265, this very question arose. The plaintiff in error, on her trial for grand larceny, was sworn as a witness in her own behalf, and on her cross-examination was asked, "have you ever been arrested before for theft?" and the question was objected to by her counsel as an attack upon her character, which had not been put in issue. It was held the question was proper, she not having made any suggestion of privilege. In delivering the opinion of the court, which received the unanimous concurrence of all the members, INGALLS, J., says, "The question was one which the court in the exercise of its discretion had a right to allow to be put and answered. *La Beau v. The People*, 34 N. Y. 223; *G. W. T. Co. v. Loomis*, 32 id. 127. The witness did not claim that she was privileged from answering the question on the ground that it would disgrace her. Hence the case cited by the counsel for the plaintiff in error (*Lohman v. The People*, 1 N. Y. 380) does not apply in this case. I perceive no ground for disturbing the decision of the general term." This opinion was reaffirmed in *Connors v. The People*, 50 N. Y. 240. It is well settled that neither party to a suit can raise the objection for and on behalf of the witness. It follows that a party who takes the stand as a witness cannot by his counsel interpose the objection that the inquiry, if truly answered, would lead to self-criminative answer, when the witness, whether regarded as party or witness, does not claim the privilege of exemption from answering. The privilege, it must be borne in mind, is purely personal.

The objection, therefore, that the questions would tend to criminate

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the defendant if truly answered, would, according to the authorities cited seem not open to the defendant, as when testifying he did not claim his privilege.

Even if it was otherwise, it will be found that the inquiries proposed were strictly within the principles established in numerous and well-considered cases.

The objection is taken that the counsel for the State, in his inquiries of the defendant after at his own request he was a witness, transcended the limits of legitimate cross-examination.

The defendant was charged with having sold intoxicating liquors to one Charles T. Goodwin, on a day certain. It is immaterial, so far as regards his criminal liability, whether the sale was by him or his authorized agent. He was not obliged to testify. He does testify upon "his own request." He goes on the stand and denies the sale or the authority to sell. He exonerates himself. He denies the commission of the offense charged. He is subject to cross-examination as the necessary result of his assuming the position of a witness. What are the limits which the law imposes on this cross-examination? It will hardly be contended that he can go on the stand and by a simple denial escape all discreditive or criminative cross-interrogation. In *Com. v. Morgan*, 107 Mass. 199, the question under consideration arose, and in delivering the opinion of the court, COLT, J., says "his testimony on cross-examination was admissible, although it tended to criminate himself. By taking the stand as a witness he waived his constitutional privilege of refusing to furnish evidence against himself, and subjected himself to be treated as a witness. Stat. 1866, ch. 260. *Com. v. Mullen*, 97 Mass. 545; *Com. v. Bonner*, id. 587. Under our rule, the cross-examination of a witness is not confined to the matters inquired of in chief. *Moody v. Rowell*, 17 Pick. 490, 498." If a witness state a fact he is bound to state all he knows about it, though in so doing he may expose himself to a criminal charge. In *State v. K.*, 4 N. H. 562, the witness said he knew the defendant was innocent of the offense charged, but he could not state how he knew that without implicating himself. The court said, "if he chooses to testify to that fact, we shall permit the attorney-general to inquire how the witness knows that fact, and compel him to answer the question." If he discloses part, he must disclose the whole in relation to the subject-matter about which he has answered in part. *Coburn v. Odell*, 30 N. H. 540; *Foster v. Pierce*, 11 Cush. 437. Answering truly in part with answers exonerative, he cannot stop midway, but must proceed, though his further answers may be self-criminative. Answering falsely as to the subject-matter, he is not to be exempt from cross-exam-

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ination because his answers to such cross-examination would tend to show the falsity of those given on direct examination. If it were so, a preference would be accorded to falsehood rather than to truth. It was held in *Gill v. The People*, 5 N. Y. Sup. 308, that, when the prisoner took the stand as a witness, he could be interrogated as fully as necessary to test the truth of his testimony.

Now what was the matter under investigation? A sale by the defendant or his servant in his shop. It matters not whether the sale or the authority to sell is denied. His answer is exonerative. The question is put, "did you have any bottles there filled with gin, whisky, rum and brandy, pint, quart and half-pint bottles?" Shall the question be answered? The question is pertinent to the case. A sale is denied. Before selling, he must have liquors to sell. Selling implies having. It is important to prove having. Having being admitted, for what purpose were they had? Were they like —

"broken teacups, wisely kept for show,"

or were they a standing notice to the incomer inviting him to partake of their contents? His direct examination related to the sale made in his shop. It would be a strange restriction upon the right of cross-examination to refuse permission to the inquiry made. In *Com. v. Morgan*, 107 Mass. 199, the defendant was indicted for a libel. He denied having seen the libels until they were pointed out to him. On cross-examination he was asked if he was not the publisher of the paper in which they appeared. He, not his counsel, objected on the ground that his answer might criminate him; but the objection was overruled, and he answered that he, with another, published the paper, and upon exceptions to this ruling the propriety of the ruling was sustained.

The sale here was by the servant. These liquors were in the shop. The purpose for which they were, was material, whether for ornament or for use. The defendant was asked if he had any doubt that he sold to numerous persons within thirty days prior to the sale for which he was on trial. This inquiry he answered in the negative, not however interposing any personal objection to answering. Had the sale been by him, though denied, the question would have been proper. In *State v. Foster*, 23 N. H. 348, a witness having testified as to part of a transaction with one Jefferson, was asked if he sold any brandy, in the question, to which he objected to answer as criminating himself, but he was required to answer, and the ruling so requiring him was held correct. In *State v. Ober*, 52 N. H. 459; S. C., 13 Am. Rep. 88, the defendant, on trial of an indictment for keeping liquors for sale, was asked as to sales

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by him a year previous to the time mentioned in the indictment, to which he declined answering, because his answer might tend to criminate him. The court did not compel him to answer, but permitted counsel to comment upon his refusal to answer. Upon exceptions to this permission, its propriety was affirmed; the court held the inquiry proper and that he might have been compelled to answer the question propounded by the State's counsel. "It was material," observes FOSTER, J., "to the issue, if not directly involved in his own proffered testimony. At this point, for obvious reasons, he saw fit to close his lips, and the court allowed him to remain silent. Of this mistaken clemency he cannot now be heard to complain." In *State v. Bonney*, 39 N. H. 206, proof that the defendant who kept the hotel sold liquors was received as tending to show that the servant was authorized to make such sale. In *State v. Colston*, 53 N. H. 483, evidence that the defendant, the keeper of the Sherman House, kept liquors there at a certain date, has a tendency to prove that the defendant, still keeping the same house, kept liquors there at a subsequent date.

The inquiry made, and to which we have referred, and similar inquiries were proper on cross-examination. The subject-matter of investigation was a sale claimed to be illegally made. The question of authority to sell was raised. True, the authority of the servant to sell was denied. But he was properly cross-examined to negative the truth of that denial. His own example would tend to show whether his denial was true or not, and whether there was authority to sell or not. This is fairly a part of the transaction disclosed in the direct testimony. His acts tending to negative the truth of his denial related to the subject-matter of the sale, which he denied having authorized. He might have been asked if he did not authorize the sale. Equally he might be asked as to other acts of his, tending to prove authority. That the defendant kept the shop at which the liquors were sold; that they were his; that he was in the habit of selling them; that the servant who, it was asserted, has disobeyed his command, was retained in his employ to the time of trial, were facts proper for the consideration of the jury, upon the inquiry whether the command, given to the servant alleged to be disobedient, was given to be obeyed or disobeyed; whether it was real or colorable; and whether the servant acted in accordance with the understood and actual wishes of his master, or was imperiling his property as well as his person, by action in direct disobedience to his commands.

The counsel refer us to *Tillson v. Bowley*, 8 Greenl. 163, and to *Low v. Mitchell*, 18 Me. 374, as authorities against the correctness of the cross-examination of the respondent as conducted by the county attorney.

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These were bastardy cases, and the complainant was inquired of as to whether, about the time charged in the complaint, she had intercourse with any other man than the respondent, by whom the child might be begotten. The presiding justice ruled that she was not obliged to answer, and the ruling was sustained in the first case by WESTON, J., who says : " The complainant could not be held to answer a question admitting or accusing herself of an offense which by our law may be criminally prosecuted."

The limits of the cross-examination of a witness who, at the same time, is a party, were not discussed by the counsel, nor considered by the court. The general rule is well settled that a witness, while not obliged to criminate himself, may waive that privilege, and consenting to testify to a matter criminating himself, must testify in all respects relating to that matter as far as may be material to the issue. Now the issues in the cases cited was the paternity of a child begotten by somebody upon the body of the complainant. It is obvious that the more unchaste the mother, and the more numerous her paramours, the greater the uncertainty of paternity. The defendant is charged with the paternity of the child born. That is the matter in issue about which the inquiry was made in the first instance, and about which the complainant has consented to testify. Cannot she be cross-examined to weaken or negative the force of her direct charge? Her knowledge of the paternity is the question, and cannot she be inquired of as to the possibility of her assured knowledge, as to who, among the recipients of her favors, is entitled to the doubtful honors of fatherhood?

In *Low v. Mitchell*, 18 Me. 372, SHEPLEY, J., while merely affirming the first decision, says, if the witness " consents to testify to one matter tending to criminate himself, he must testify fully in all respects relative to that matter, so far as material to the issue." If the matter of paternity was the matter in issue, as it was, having voluntarily commenced testifying, the witness must testify fully thereto, so far as is material to the issue. Such is the logical result of the general doctrine of the opinion. *Swift on Ev.* 81; *Norfolk v. Gaylord*, 28 Conn. 309.

A witness on cross-examination must answer as to all matters pertinent to the issue, whether inquired about in the direct examination or not, unless a personal privilege is invoked and the matters elicited would tend to criminate him; in which case the cross-examination can be extended only to the subject-matters of inquiry of the direct examination. In the case at bar, the subject-matters of inquiry were a sale and whether it was authorized by the defendant — involving the double inquiry of a sale and its authorization — which being denied by the defendant, he was

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properly cross-examined as to his acts tending to show that whatever was done in his shop was done by his implied authority.

[The remainder of the opinion is unimportant.]

WALTON, BARROW, DANFORTH and VIRGIN, JJ., concurred.

PETERS, J., concurred in the result.

 EASTMAN V. WADLEIGH.

(65 Me. 251.)

Judgment—service by attachment—effect of judgment.

A judgment against a non-resident where jurisdiction is based only on an attachment of property, without personal service, is but a judgment *in rem*, good only against the particular property attached, and cannot be made the basis of an action of debt, in order to obtain satisfaction out of other property of defendant.*

ACTION of debt brought on a judgment. The opinion states the case.

E. Eastman, pro se.

E. B. Smith, for defendant.

APPLETON, C. J. The plaintiff commenced a suit against the defendant, a non-resident, on which an attachment was made of his real estate. The writ described him as a resident of St. Louis, Missouri. Notice was given of the pendency of the suit, in conformity with R. S., ch. 81, § 19, by publication in a newspaper in this county. Judgment was rendered in favor of the plaintiff at the May term, 1870, of this court, and an execution issued thereon. A levy was commenced on the real estate, but the proceedings were not recorded, nor does it appear that the plaintiff ever accepted seizin of any land upon which a levy had been commenced or made.

This is an action of debt upon the judgment thus obtained, and the question arises, whether it is maintainable; in other words, whether the court had jurisdictional authority to do more than render a judgment against the property attached.

* See opinion of FOLGER, J., in *Gibbs v. Queen Ins. Co.*, ante, 512.

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The State has undoubted jurisdiction over property within its territorial limits. It may subject it to taxation. It may render it liable to the payment of debts, though its owner may reside in another State.

By R. S., ch. 81, § 12, "in all actions commenced in any court proper to try them, jurisdiction shall be sustained, if goods, estate, effects or credits of any defendant are found within this State and attached on the original writ; and service shall be made as provided in the nineteenth section hereof."

It has been settled by a uniform and unvarying series of decisions that a judgment obtained as was the one upon which this action is brought, while effective to bind the property of a non-resident, and to justify its appropriation to the payment of his debts, has no force and validity as against person or property outside the territory of the State in which it is rendered. The notice to be given by section 19, though given as required, will not give jurisdiction so that the judgment shall be binding elsewhere. *Ever v. Coffin*, 1 Cush. 23. So a judgment similar in its character and with like incidents rendered in another State would have no force nor validity here. *Middlesex Bank v. Butman*, 29 Me. 19.

The statute gives jurisdiction on certain conditions. What is the extent, what the limit, of the jurisdiction thus given?

The jurisdiction is to be sustained, if goods, estate, effects or credits of a defendant are found within the State, and being found are attached. Without property and its attachment, the court has no jurisdiction. Both must concur. The jurisdiction is acquired by attachment. To what extent? Not over the person of the defendant, for he is a non-resident. Not over other property; but only over the property attached. In other words the State authorizes the seizure of the real or personal estate of non-residents found within its boundaries and its appropriation to the payment of their debts. The jurisdiction is only by attachment. It is co-extensive with and limited by the attachment, and ends with the disposition according to law of the estate so attached. Where there is no attachment no valid judgment can be rendered. *Cassity v. Cota*, 54 Me. 380.

The judgment recovered by the plaintiff was clearly not of validity so as to constitute the basis of a suit without the State. What is its validity here? It is not good against the person of the defendant, for he has never been within, nor submitted to, the jurisdiction of the court. It might have been levied upon the property attached, but no levy was perfected. What then is its effect?

It is simply a proceeding *in rem*. It is a statutory process, by which a creditor, following the provisions of the statute, is enabled to appro-

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prorate the property of an absent debtor to the payment of his debts. If the appropriation is made, it is protected. If not made, the judgment ceases to have any validity, so that it can constitute the basis of a new judgment.

The authorities entitled to the highest consideration concur in the views already expressed. In *Boswell's Lessee v. Otis*, 9 Howard, 336, McLEAN, J., says: "Jurisdiction is acquired in one of two modes: first, as against the person of the defendant, by the service of process; or secondly, by a procedure against the property of the defendant, within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceedings against the property be by an attachment or bill in chancery. It must be, substantially, a proceeding *in rem*." The effect of a judgment against a non-resident debtor was again under the consideration of the Supreme Court of the United States in *Cooper v. Reynolds*, 10 Wall. 308, and the court there held, that the only effect of a judgment against a non-resident was to subject the property attached to the payment of the demand which the court might find due to the plaintiff. "The judgment of the court," observes MILLER, J., "though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of the defendant, out of any other property than that attached in the suit. The court, in such a suit, cannot proceed unless the officer finds some property of the defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction."

In *Lovejoy v. Albee*, 33 Me. 415, it was decided that when the property of a non-resident is found within the State, a judgment against him will be effectual only as a proceeding *in rem* and binding upon the property attached. In *Easterly v. Goodwin*, 35 Conn. 273, where the facts were similar to those in the case at bar, it was held that a judgment rendered in an action upon which the property of a non-resident defendant had been attached, but in which no personal service had been obtained was not a judgment *in personam*, and could not be the basis of an action of debt in the same court, and that its only effect was to authorize the appropriation of the property attached, to the payment or satisfaction of the judgment recovered in the suit in which the attachment had been made.

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At the first glance, the case of *Granger v. Clark*, 22 Me. 128, may perhaps be regarded as adverse to the views here expressed. But the decision there rendered rests upon the fact that a want of jurisdiction was not apparent of record. But in the case at bar, it appears, from the record produced, that the defendant was a resident without the State; that there was no personal service upon, nor any appearance by him. If, upon inspection of the record, it appears that judgment has been rendered without notice to the defendant, the judgment will be regarded as absolutely void. *Penobscot Railroad Company v. Weeks*, 52 Me. 456.

The causes of action set forth in the suit, in which the judgment declared upon was rendered, were an account annexed against the defendant and his promissory note. An action of debt will lie on an account as held in *Norris v. Windsor*, 12 Me. 293; and on a promissory note, as decided in *National Exchange Bank v. Abell*, 63 Me. 346. Had the plaintiff moved to amend, there is no reason why leave should not have been granted on terms. It not having been done, the nonsuit must be confirmed.

Exceptions overruled.

WALTON, BARROWS, DANFORTH, VIRGIN and PETERS, JJ., concurred.

WILDER V. MAINE CENTRAL RAILROAD COMPANY.

(65 Me. 332.)

Railroad — statute requiring to fence line. Negligence — injury to animals.

A statute requiring a railroad company to fence its lines is a police regulation, and obligatory upon all railroads whether chartered before or after its passage.

Plaintiff's horse escaped from his own land on to defendant's railroad and was killed by a locomotive. *Held*, that the plaintiff was not guilty of contributory negligence in turning the horse upon his land knowing that it was not fenced, when it was the legal duty of the railroad company to build the fence.

ACTION on the case for killing the plaintiff's horse by running over him with a locomotive. The statute required railroads to fence their roads; but the defendant had neglected to build a fence between plaintiff's land and its road. Plaintiff turned his horse into his land whence it escaped into the railroad and was killed. The jury returned a verdict for the plaintiff.

J. W. Bradbury, Jr., and A. Libbey, for defendant.

O. D. Baker and J. Baker, for plaintiff.

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DICKERSON, J. The statute requiring railroad corporations to inclose the land taken for their road with fences is a police regulation, designed to secure the safety of the public travel and transportation, and is obligatory, as such, upon all railroad corporations whether chartered before or after its passage. *State v. Noyes*, 47 Me. 189; *Ind., etc., Railway v. Townsend*, 10 Ind. 38; 1 Redf. on Railways, 493 and 494; 2 id. 428.

The counsel for the defendants contend that the land of the plaintiff adjoining the defendant's road was not "inclosed" or "improved," and was not, therefore, required to be fenced against by the defendants. We think otherwise. Though the land was used partly as a mill yard, it was also mowed, and occasionally used by animals for grazing. The cases cited by the counsel are distinguishable from this case. It appears from them that a railroad company is relieved from the obligation to fence against adjoining lands, when such fence would be a public nuisance, or prevent access to a mill through whose yard the railroad passes, or at points where its engine house, machine shop, car house, wood house, wood shop, and depot are so situated as to render a fence unnecessary. These are exceptional cases and do not include the one under consideration.

It is well settled, upon both principle and authority, that a parol agreement for the removal and discontinuance of a fence on the line of a railroad, between the owner of the land and the railroad company, does not run with the land, and cannot, therefore, bind his grantee. *Gilman v. Eur. & N. A. R. R. Co.*, 60 Me. 235; *St. L. & A. R. R. Co. v. Todd*, 36 Ill. 409.

There can be no question, therefore, but the defendants were guilty of negligence in not building a fence upon the line of their road adjoining the plaintiff's land; and the remaining question to be determined is, whether the plaintiff is guilty of contributory negligence in turning his horse out upon his land, knowing that it was not fenced. The owner of land has a right to use it in a natural and ordinary way for the purposes for which it is fit. This right does not depend upon the performance or non-performance of any duty or obligation enjoined by law upon another in respect to his land. He has a right to expect that the requirements of law will be complied with, and to act accordingly; nor does his knowledge that they have not been affect his right of use one way or the other. If it did, the neglect of another to obey the law might operate to prevent him from the lawful use of his own property. The common law made it the duty of the owner of land to guard against the escape of his cattle therefrom, but the statute devolves this duty upon the railroad

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company in the case under consideration, and the rights of the parties must be determined in accordance with this change. To hold the land-owner to the same care of his cattle, as the common law required, would be to disregard the statute, and render it inoperative. It was for the defendants to use the necessary care to prevent the escape of the plaintiff's horse on account of their neglect to build the fence. *Shearm. & Redf. on Neg.*, § 441.

In *Rogers v. Newburyport R. R. Co.*, 1 Allen, 17, which was tort for the loss of a colt run over by the defendants' cars, the court say, "the plaintiff had a right to place his colt in his pasture to feed, and was under no obligation to the defendants to use any care to prevent escape by reason of their neglect to maintain the fence. It was for them to use the necessary care to prevent such an escape." *Gardner v. Smith*, 7 Mich. 410.

In *McCoy v. Cal. & Pac. R. R. Co.*, 40 Cal. 532; S. C., 6 Am. Rep. 623, the line of the road was not fenced where it passed through the field occupied by the plaintiff, and the live stock of the plaintiff running in this field strayed on to the road and were killed by the defendants' train; and the court held that these facts made out a *prima facie* case against the defendants, and also, that the plaintiff was not guilty of contributory negligence, from the fact that he knew that the road was not fenced, when he turned his cattle in to the field. *Kellogg v. Ch. & N. W. R. R. Co.*, 26 Wis. 223; S. C., 7 Am. Rep. 69.

The presiding justice stated the rule of law correctly when he instructed the jury that the plaintiff had a right to use his land in the ordinary way, and that the mere fact that the railroad adjoining his land was not fenced, was not proof that he was negligent in turning his horse out there. The question of fact, whether, under all the circumstances of the case, it was negligence in the plaintiff to turn his horse out as he did, was submitted to the jury under appropriate instructions. It was the exclusive province of the jury to determine this question, and they found it in favor of the plaintiff. The jury were aided in their investigation by a plan of the premises, verified and explained by the engineer who drew it. They also saw the witnesses and could judge of their credibility from their appearance on the stand. It is next to impossible for the court in this class of cases to put itself in the situation of the jury so as to be able to say whether or not its decision would have accorded with theirs if it had occupied their place at the trial. Hence the wisdom of the rule that the court will not set aside a verdict as against evidence or the weight of evidence unless it is so manifestly so as to render it apparent that the jury have mistaken or disregarded the evidence. In re-

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viewing the testimony in this case we do not find such ground for setting aside the verdict.

Motion and exceptions overruled. Judgment on the verdict.

APPLETON, C. J., WALTON, BARROWS and VIRGIN, JJ., concurred.

LINDLEY v. UNION FARMERS' MUTUAL FIRE INSURANCE COMPANY.

(65 Me. 368.)

Fire insurance — subsequent insurance by void policy.

Plaintiff, having a policy of insurance in defendant's company conditioned to be void in case of subsequent insurance without notice, obtained further insurance without notice in another company on the same and other property, but the second policy was void because of a condition therein against other insurance. A loss having occurred, plaintiff accepted from the second company a sum in compromise of his claim against them. *Held*, that he was not estopped to show that the second policy was void, and that on so showing he could recover on the first.*

ACTION of assumpsit on a policy of insurance against fire issued by defendant, July 1, 1869, for four years upon plaintiff's dwelling and out-buildings. The policy contained this condition, "and if the said insured or his assigns shall hereafter make any other insurance on the same property and shall not with all reasonable diligence give notice thereof to this company and have the same indorsed on this instrument or otherwise acknowledged by them in writing, this policy shall cease and be of no effect."

On January 1, 1873, the Hartford Insurance Company issued a policy upon the same and other property (the plaintiff representing that there was no insurance thereon). This policy contained a provision of forfeiture, "if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, whether such other insurance is valid or invalid, without the consent of the company written hereon."

Neither of the companies received the notice, or gave the consent provided in the policies.

June 17, 1873, the "house and out-buildings" described in the policies were suddenly destroyed by fire.

The plaintiff brought suit upon the Hartford policy, which was entered March term, 1874, answered to by the company, and settled in July, 1874,

* See *Thomas v. Builders' Mut. Ins. Co.*, ante., p. 317 and note.

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for \$1,000 paid by the company to the plaintiff. Whereupon the Hartford policy was canceled and surrendered, and the action entered neither party at the September term, 1874.

The writ in this case was dated August 10, 1874; the plea was the general issue, and the case was made law on facts agreed, substantially as stated above.

D. N. Mortland & G. M. Hicks, for plaintiff.

A. S. Rice & O. G. Hall, for defendants. I. The cases *Jackson v. Mass. Mut. Fire Ins. Co.*, 23 Pick. 418; *Clark v. New England Mut. Fire Ins. Co.*, 6 Cush. 342; and *Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen, 217, which establish in Massachusetts the rule of law, that to avoid a policy containing a clause against subsequent insurance without notice, the subsequent insurance must be by a valid and legal policy, are in direct conflict with *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, and *Bigler v. New York Ins. Co.*, 22 N. Y. 402. And that rule has received no countenance in this State except in the dictum of Judge TENNEY, in *Philbrook v. New England Mut. Fire Ins. Co.*, 37 Me. 137. Its adoption in this State is still an open question; and in view of the fraudulent practices to which it is likely to lead, it is respectfully submitted that it is good law, as well as the safer policy, to hold, with the Supreme Court of the United States, that if the second policy, at the time it was made, was treated by all the parties thereto as a valid and subsisting policy, and has never in fact been avoided, then the policy declared on is void.

II. But however the court might decide the foregoing proposition, the plaintiff in this case, by bringing suit upon the second policy, and collecting it, is now concluded, upon the principle of election, from denying its validity. "The general rule is, that a person cannot accept and reject the same instrument." 2 Story's Eq. Jur., § 1077, n. 2. "This same rule of election applies to every species of right." *Weeks v. Patten*, 18 Me. 42. It is analogous to estoppel, and constitutes a rule of law. In order to enable a court of law to enforce the principle, the party must have acted upon an instrument in such a manner as to be deemed concluded by what he has done, that is to have elected. 2 Story's Eq. Jur., § 1080; *Smith v. Smith*, 14 Gray, 532; *Weeks v. Patten*, 18 Me. 42; *Smith v. Guild*, 34 id. 443.

The only cases to be found which sustain such a proposition are *Philbrook v. N. E. Mut. Fire Ins. Co.*, 37 Me. 137, where the above-mentioned dictum stands absolutely unsupported by authority, and *Hardy v*

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Union Mut. Fire Ins. Co., 4 Allen, 217, which is based solely upon the dictum. In neither of these cases, however, did the fraud of over-insurance, which is a distinctive feature of this case, exist. And in the latter case the court say, that the doctrine of estoppel does not apply, because the defendants "have not been injuriously affected" by the second policy. But in the case at bar the policy contains another clause, by the terms of which the plaintiff could only recover of defendants the proportion of the loss sustained, which the amount insured by their policy bore to the whole amount insured; so that defendants are injuriously affected by the second policy, first, by being deprived of the opportunity to cancel their policy, if they so elected, or, second, by being deprived of the benefit of the reduction of plaintiff's claim in the proportion above stated.

BARROWS, J. The defendants place their defense wholly on the ground that the plaintiff, in violation of the terms of the policy on which he declares, made a subsequent insurance upon the same property, and did not give notice thereof with all reasonable diligence to the defendant company, and have the same indorsed on his policy, or otherwise acknowledged by them in writing.

It is admitted by the defendants that the buildings insured were accidentally destroyed by fire before the expiration of the term for which they were insured, and that preliminary proof of loss was received by them without objection. It is admitted by the plaintiff, that some months before the fire he procured a policy in the Hartford Fire Insurance Company, for a term of three years upon these buildings and certain personal property therein contained, for \$2,100, \$1,500 of which was on the buildings, upon which policy, after the fire, he brought suit, which the Hartford company compromised, after it had been one term in court, by the payment of \$1,000, for which plaintiff canceled and surrendered his policy in that company. But the plaintiff contends that his policy in the Hartford company was invalid, and that he could not have compelled that company by law to pay his loss thereon, on account of a stipulation which it contained, that "if the assured shall have, or shall hereafter make any other insurance on the property hereby insured, whether such other insurance is valid or invalid, without the consent of the company written hereon . . . this policy shall be void."

The defendants not questioning the proposition that the Hartford policy was void by reason of this stipulation and the prior insurance in the defendant company, endeavor to maintain, as matter of law, that the cases in Massachusetts, in which it is held that to avoid a policy containing a clause against subsequent insurance without notice, the subsequent in-

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insurance must be by a valid and legal policy, are likely to lead to fraudulent practices, and ought not to be followed, that they have never yet been adopted in this State, or received any countenance except in a dictum in *Philbrook v. N. E. Mut. Fire Ins. Co.*, 37 Me. 137, that they are in conflict with decisions of the Supreme Court of the United States, and of New York, and that the true rule is, that "if the second policy at the time it was made was treated by all the parties thereto as a valid and subsisting policy, and has never in fact been avoided," then a prior policy containing terms and conditions with respect to subsequent insurance like the one here in suit will be void. The defendants further contend that the plaintiff is estopped from denying the validity of the policy in the Hartford company, by virtue of his reception of a valuable consideration in settlement of his suit thereon.

That there is a direct conflict between the decisions of the Massachusetts court in *Jackson v. Mass. Mut. Fire Ins. Co.*, 23 Pick. 418; *Clark v. N. E. Mut. Fire Ins. Co.*, 6 Cush. 342, and *Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen, 217, and those of the United States Supreme Court, in *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, and the Supreme Court of New York in *Bigler v. New-York Ins. Co.*, 22 N. Y. 402, upon the principal point here raised, cannot be denied.

The doctrine of the Massachusetts court is supported by the decision of the Supreme Court of Pennsylvania, in *Stacey v. Franklin Fire Ins. Co.*, 2 Watts & Serg. 506; and while a decision of the point by our own court was not absolutely necessary to the conclusion reached in *Philbrook v. N. E. Mut. Fire Ins. Co.*, 37 Me. 137, it formed so important a step in the process by which the court arrived at the result, that it was doubtless well considered, and substantially agreed to.

The case of *Clark v. N. E. Ins. Co.*, 6 Cush. 342, was carefully considered, the doctrine of the United States court in 16 Pet. thoroughly discussed, and the Massachusetts court adhered to the decision in 23 Pick. 418. The point was up for a reconsideration in *Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen, 217, a case not distinguishable in its essential facts from the one before us, where the company making the subsequent insurance had recognized the validity of the policy issued by them, and had paid the insured the amount secured by it; and the court reiterated its former decisions of the principal question, and adopted the doctrine asserted in *Philbrook v. N. E. Mut. Fire Ins. Co.*, 37 Me. 137, with regard to the supposed effect of a payment by the subsequent insurers upon a void policy, holding that the facts which occurred subsequently to the loss did not constitute an estoppel in favor of the defendants.

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Very clearly that must be so; the defendants could be no more injuriously affected by those acts than they would be by a donation of like amount to the plaintiff from any other party. The mere contingency that the company issuing the subsequent policy will do this does not amount to an insurance. If the rights of the parties are to be governed by a stipulation that the policy granted by the defendants shall be void in case the assured shall afterward "make any other insurance on the same property," not made known to the insurers and indorsed or otherwise acknowledged by them, we think both law and logic unite in declaring that an abortive attempt to make insurance does not meet the call nor avoid the first policy.

The Hartford company have fortified their condition by stipulating for a forfeiture, "whether such other insurance is valid or invalid;" and this would include a case of simple procurement or holding of a policy whether binding or not. But such is not the condition in the policy issued by these defendants.

We find no such overpowering weight of authority or reason in favor of the defendants' construction of the terms of this condition, as inclines us to retract the intimation given by this court in *Philbrook v. N. E. Ins. Co.*, 37 Me. 137. The defendants having agreed to a default unless the plaintiff's action is defeated by what is erroneously claimed to be a second insurance, the defense fails. There is another view of the case leading to the same result. In 1861, the legislature of this State designing to make the contract of insurance what it purports to be, a contract of indemnity against all fair accidental losses by the perils insured against, enacted among other provisions in ch. 34, Laws of 1861, that no breach of any of the conditions or terms of the contract by the insured shall affect the contract unless the risk was thereby materially increased.

This was substantially re-enacted in R. S., ch. 49, § 19; and in § 20, it is declared that "all provisions contained in any policy of insurance in conflict with any of the provisions hereof are null and void; and all contracts of insurance made, renewed or extended in this State, or on property within this State, shall be subject to the provisions hereof." The defendants claim here to be relieved by this alleged breach of one of the terms of the contract by the insured.

But under the statute provisions just quoted, the plaintiff's action would not be defeated even by a subsequent valid policy of insurance, unless it also appeared that the risk was thereby materially increased. The case is barren of any such proof. The insurers expressly admit that during the life of the policy the buildings were accidentally destroyed by fire, and that notice of the loss was given to them, which

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they received without objection. It was against such a loss as they have admitted, that they contracted to indemnify the plaintiff.

Defendants defaulted.

APPLETON, C. J., WALTON, DICKERSON, DANFORTH and LIBBY, JJ., concurred.

SLEEPER v. UNION INSURANCE COMPANY.

(65 Me. 385.)

Marine insurance — "for benefit of whom it may concern" — who may recover on policy.

The part-owner of a vessel mortgaged his share and then procured an insurance on the vessel "for the benefit of whom it may concern;" a loss occurring and the part-owner being dead, *held*, (1) that his administratrix could recover the entire amount in an action on the policy, and (2) that payment of the judgment in her favor by the underwriters was a bar to a suit by the mortgagee.*

ACTION of assumpsit on a policy of marine insurance. The opinion states the case.

C. P. Set. on, for defendants.

A. P. Gould & J. E. Moore, for plaintiff.

APPLETON, C. J. E. K. Alexander, being the owner of one-fourth of the *Abbey Brackett*, mortgaged the same to the plaintiff to secure a note of hand of \$1,500. Being about to proceed on a voyage, he procured an insurance on his vessel to the amount of \$2,000, "on account of whom it may concern, loss payable to him."

The policy thus obtained was forwarded to the wife of Alexander. The vessel being lost and Alexander dead, his wife, *Annie D. Alexander*, was appointed administratrix, commenced a suit on the policy and obtained a judgment thereon which the defendants have paid.

The jury have found that the policy was for the benefit of the plaintiff and Alexander to the extent of their respective interests. The question is whether upon these facts the plaintiff can maintain a second suit upon this policy.

When a broker or part-owner effects a policy "for the benefit of

* See *Knight v. Eureka Ins. Co.*, *post*.

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whom it may concern," a suit in case of loss may be maintained upon such policy in the name of the party effecting the policy or in the name or names of those for whose benefit it was made and who are, and are intended to be, insured under the clause "on account of whom it may concern" or some similar form of expression, although they are not named in the policy. "You may bring your action," observes BAILEY, J., in *Sargent v. Morris*, 3 B. & A. 277, "either in the name of the party by whom the contract was made or of the party for whom the contract was made."

The administratrix of the party with whom the policy was made had the same right to bring the suit as her intestate. If the party with whom a contract is made can bring an action upon it, his administrator or executor can do the same. No instance can be found where it has not so been held. If the administratrix of Alexander could not do it, it would be the only exceptional case where it could not be done. If Alexander was a mere agent the suit would have been for the benefit of the *cestui que trust*. The same result would follow if the suit is brought by the administratrix. The court in such case will protect the party interested against the nominal party.

A recovery being had for the whole amount insured, this plaintiff might have recovered of the administratrix to the extent of his insurable interest. *Burrows v. Turner*, 24 Wend. 276.

It has been seen that an action may be maintained on a policy in the name of the party to whom the same is payable or of the parties "whom it may concern." But one action is maintainable. 2 Phillips on Insurance, §§ 1965, 1972. There is but one party who can maintain an action, either the party to whom the policy is made payable or the person or persons "whom it may concern."

A judgment has been recovered upon the policy in the name of the administratrix. She had possession of the policy and an interest in the same. She was authorized to commence a suit, and the suit so commenced was for the benefit of whom it may concern. A judgment has been recovered by her upon the policy, which has been fully satisfied. A second suit for the same cause of action, or for a portion of the same cause, cannot be maintained. "If there be any one principle of law settled beyond all question," observes BARBOUR, J., in *U. S. v. Leffler*, 11 Pet. 100, "it is that whenever a cause of action, in the language of the law, *transit in rem judicatum*, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever." Unless such is the law, the defendants are without protection by any judgment rendered against them in a suit by the party

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with whom they contracted. New parties may claim to be included in the clause "whom it may concern," and this judgment be no better or more effectual bar than the one already rendered against them.

This plaintiff, it must be remembered, had no right to revoke the suit by the administratrix, inasmuch as her intestate had an interest in the policy. He might intervene for his own protection, but he could not, even if he had received the amount claimed by him as due, have defeated the action brought by Mrs. Alexander. *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198. The defendants have paid a judgment rendered against them by a party authorized to sue, having possession of the policy and against whose suit they could not have made any legal defense whatever.

New trial granted.

WALTON, VIRGIN and LIBBEY, JJ., concurred.

DICKERSON, J., delivered a dissenting opinion the gist of which may be gathered from the following passage with which he closed: "The error in the opinion of the chief justice consists in the assumption that the administratrix of one of the parties interested in a policy of insurance has the same right to bring an action upon it, that her intestate had in his life-time. This is contrary to the doctrine of the most approved text-books, and the hitherto unbroken line of authorities, hereinbefore cited. No case is cited to sustain this view of the case, nor is it believed that any one can be found. The case of *Burrows v. Turner*, 24 Wend. 276, simply decides that where one of the parties originally interested in a policy of insurance collects the whole amount of the loss in his own name, and withholds from the other party his share, he is liable to such party, therefor, in an action for money had and received. In that case both of the parties were living, and the question, whether the representative of a deceased party jointly interested in a policy of insurance with another person or the survivor alone can maintain an action upon it, did not arise and was not considered by the court. I cannot resist the conclusion that the doctrine of the chief justice upon this branch of the case is not sustained by argument, principle or authority; it is *petitio principii*."

BARROWS, J., concurred in the dissenting opinion.

DANFORTH, J., concurred in its result.

PETERS, J., being interested, did not sit.

Brown v. Inhabitants of Vinalhaven.

BROWN V. INHABITANTS OF VINALHAVEN.

(65 Me. 402.)

Municipal corporation — negligence of agents — spread of contagious disease.

The selectmen of a town, in the performance of a duty imposed upon them by statute, employed a person as nurse in a small-pox hospital established by the town, and suffered him to depart without being properly disinfected, whereby plaintiff caught the disease. *Held*, that the town was not liable.*

ACTION on the case. The declaration alleged that the small-pox broke out in Vinalhaven in the fall of 1872; that it became the duty of the town to provide a pest-house and medical attendance, which they performed, employing one Conway to act as nurse; that after Conway had been for three weeks exposed to the disorder he was allowed by the physician to leave the pest-house and return to the dwelling of the plaintiffs' with whom he had before resided; that, relying upon the doctor's skill and the exercise of ordinary care by him and by the selectmen, and believing, therefore, that said Conway was properly disinfected and cleansed, the plaintiffs associated with him; but, in fact, he and his clothing were still infected with the contagion which was communicated to Mrs. Brown, who had the disease so badly as to lose the sight of one eye and to be greatly disfigured. If proof of these facts would sustain the action it was to stand for trial; otherwise, the plaintiffs were to be nonsuit.

G. A. Perrigo & L. M. Staples, for plaintiffs. The selectmen being the municipal officers were *ex officio* a health committee. R. S., ch. 14, §§ 14, 15. As such they lawfully acted within the scope of their authority for the town, but negligently; they did their duty in a negligent manner.

To the general rule that municipal corporations are not liable to a suit except when the right of action is given by statute, the following statute provision is relied upon in answer as an exception: "When an act that may be lawfully done by an agent is done by one authorized to do it, his principal may be regarded as having done it." R. S., ch. 1, § 4, cl. 21.

This clause is cited by the court in *Kidder v. Knox*, 48 Me. 551, to the point that the selectmen had the right to contract for the town as their agents, and that the town would be liable on its contracts made by them.

* See also *Ogg v. Lansing*, 14 Am. Rep. 499; S. C., 35 Iowa, 495.

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Being liable for the acts of its agents in contract, it is submitted that they are also liable for the same reason for their tortious acts and negligence in this case under the maxim *respondeat superior*.

D. N. Mortland & G. M. Hicks, for defendants. If there has been a neglect of a public corporate duty for which no remedy has been provided by statute for the party aggrieved, this suit cannot be maintained. *Mitchell v. Rockland*, 52 Me. 118.

BARROWS, J. If the action cannot be maintained upon the facts alleged in the writ, the plaintiffs are to be nonsuited, otherwise the case to stand for trial.

The writ sets forth the breaking out of the small-pox in the defendant town, refers to the statute provisions touching the powers and duties of towns and town officers relative to the establishment of hospitals, the regulations to be observed by physicians and nurses and others exposed to infection, and the care to be taken to prevent the spread of malignant and contagious diseases; recites the employment of one Conway as a nurse by the selectmen of the town, his reception into a pest-house by order of the selectmen, and a physician employed by them in behalf of the inhabitants of the town; and alleges in substance that he was carelessly and negligently thereafter permitted by them to return, without being properly cleansed and disinfected, to the house which he formerly occupied, of which the female plaintiff was an inmate; and so she contracted the disease to her great injury, suffering and loss, all which matters and things are circumstantially set forth.

The plaintiffs base their claim upon the mistaken idea that the selectmen, in the performance of the duties imposed upon them by the statutes in such cases, sustain to the town by whom they are elected, the relation of a servant to his master or an agent to his principal, and that the rule *respondeat superior* applies, if they conduct themselves carelessly or unskillfully. It is not pretended that the statute gives a remedy against the town to any one injured by reason of the negligence, ignorance or inefficiency of the town officers or those employed by them in these matters. By chapter 14, section 10, the town is required to pay a just compensation to parties interested when the proper officer upon due proceedings had, impresses or takes up any houses, stores, lodging or other necessities, or impresses any man, under the provisions of the chapter. But beyond this, as to any liability of the town for the doings, misdoings, or omissions of its officers in the performance of the duties imposed upon them by law, the statute is silent.

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The liability of a town upon contracts made within the scope of their authority, about the affairs of the town by such of its officers as are also its agents, is unquestionable. But its responsibility for the torts or neglects of its officers in the performance of duties imposed upon them by law has never been affirmed, unless created by express statute provisions. On the contrary, the distinction between "corporations created for their own benefit" and "*quasi* corporations created by the legislature for purposes of public policy," in respect to their liability for such wrongs and neglects, was long since declared in our parent Commonwealth in the case of *Mower v. Leicester*, 9 Mass. 247, and we believe has never been overlooked by our own court. *Adams v. Wiscasset Bank*, 1 Me. 361. The principle which must be decisive of this case was so fully discussed in *Mitchell v. Rockland*, 52 Me. 118, that a reference to that case and the authorities there cited, seems to be all that is necessary.

Plaintiffs nonsuit.

APPLETON, C. J., WALTON, DICKERSON, DANFORTH and LIBBEY, JJ., concurred.

BRIGHTMAN V. INHABITANTS OF BRISTOL.

(65 Me. 426.)

Nuisance — abatement of — destruction of buildings by mob — evidence — damages.

When a nuisance consists in the use to which a building is put and not in its location, the abatement must consist only in putting a stop to such use.

In an action against a town, under a statute, to recover damages for the destruction of a building by a mob, *held*, (1) that evidence that the business carried on in the building was, from its noisome smells, a public nuisance was inadmissible (the business not being of itself unlawful) either to justify the destruction or as tending to show contributory negligence on the part of the plaintiff; (2) that the actual value of the property at the time it was destroyed was the basis of the measure of damage.

ACTION on the case under the statute to recover three-fourths of the value of a porgy-oil factory situated in Bristol alleged to have been destroyed by a mob. The opinion sufficiently states the case.

J. Baker, for defendants.

A. P. Gould & J. E. Moore, for plaintiffs.

APPLETON, C. J. This is an action on the case under R. S. 1857, ch.

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123, § 8, to recover three-fourths of the value of a porgy-oil factory, alleged to have been burnt and destroyed by a mob, on 29th April, 1868. A verdict was rendered in favor of the plaintiffs, and the case comes before us upon exceptions to the rulings of the presiding justice.

The defendants' counsel offered to show that strong and offensive odors arose from the plaintiffs' factory, and that it was a public nuisance, and a nuisance to those residing in its vicinity, but all evidence to show the factory a nuisance was excluded.

It may be conceded that the factory is a nuisance within the provisions of R. S. 1857, ch. 17, § 1, and that the noxious exhalations, offensive smells and stench arising from its operations approximate to the unbearable. But the manufacture is not, in and of itself, unlawful. It is not prohibited. It is sanctioned, if carried on in a place which has been duly assigned for such manufacture. The statute does not require the destruction of the buildings or of the machinery used in its operations, but that the business should not be carried on at a place where from its location it would be a nuisance. The statute, giving the power of abatement after conviction upon due process, does not in addition confer upon an irresponsible public the right to enforce the penalties it establishes, without process of law. A lawful business may so be carried on as to become a nuisance. Undoubtedly in certain cases and under certain limitations, nuisances may be abated by those specially aggrieved thereby. But when the subject-matter of complaint is lawful *per se*, and the nuisance consists not in the business itself, but in the unsuitable place in which it is carried on, its abatement must be by the judgment of the court, and by the officers of the law carrying into effect such judgment, and not by the blind fury of a tumultuous mob. Only so much must be abated as constitutes the nuisance. If it consists in the use of a building, such use must be prohibited and punished. If the location is what constitutes the nuisance, it must be removed. A smith's forge, in *Bradley v. Gill*, Lutw. [29]; a tobacco mill in *Jones v. Powell*, Hut. 136; a manufactory for spirits of sulphur, in *White's case*, 1 Burr. 333; a distillery, in *Smith v. McConathy*, 11 Mo. 517; a slaughter-house in *Brady v. Weeks*, 3 Barb. 157; a livery stable, in *Coker v. Birge*, 10 Ga. 336; a melting-house in *Peck v. Elder*, 3 Sandf. 126; a gaming-house or grog shop, in *State v. Paul*, 5 R. I. 185; a powder magazine, in *Cheatham v. Shearon*, 1 Swan, 213; a blacksmith shop, in *Norcross v. Thoms*, 51 Me. 503; a tallow factory, in *Allen v. State*, 34 Texas, 230; a tannery, in *Rex v. Pappineau*, 1 Strange, 686; have been declared nuisances, because of their unsuitable location, but that will not justify a riotous mob in burning and destroying them. A tomb erected upon one's own land is not necessarily a nuisance;

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but it may become such from its location. *Barnes v. Hathorn*, 54 Mo. 125. But it is not therefore to be destroyed. Its use may be prohibited. The plaintiffs' porgy-oil factory stands upon the same ground.

These views are sustained by an almost unbroken series of decisions. In *Rex v. Pappineau*, 1 Strange, 686, the defendant was indicted for a nuisance by reason of his tannery, and fined £100. A writ of error was brought, and one of the reasons given for its reversal was, "that the judgment was erroneous for want of an adjudication that the nuisance must be abated." "But," says Lord RAYMOND, "regularly the judgment ought to be, to abate so much of the thing as makes it a nuisance. . . If a dye-house or any stinking trade were indicted, you shall not pull down the house where the trade was carried on." In the same case, REYNOLDS, J., says: "Roasting of coffee was formerly thought a nuisance and yet nobody ever imagined the house in which it was roasted should be pulled down." Then referring to the tannery, he adds, "I should think it would have been going too far, if they had adjudged the whole erection to be abated for a particular abuse of it in dipping some stinking skins." In *Barclay v. Com.*, 25 Penn. 503, the nuisance for which the defendant was indicted, was the maintenance and continuance of a barn near to and above a spring reserved for the inhabitants of Bedford, for supplying their general pump with water; and the indictment charged, that by storing hay and feeding cattle, the water of the spring was rendered impure, corrupted and unfit for use. Upon the question whether the sheriff should abate the nuisance by removing the barn, WOODWARD, J., says: "The offense lay in the use made of the barn and yard in close proximity to the spring, and the nuisance would be effectually abated by discontinuing such use. When an erection or structure itself constitutes the nuisance, as when it is put up in a public street, its demolition or removal is necessary to the abatement of the nuisance; but when the offense consists in a wrongful use of a building harmless itself, the remedy is to stop such use, not to tear down or remove the building itself." In *Welch v. Stowell*, 2 Doug. (Mich.) 332, an action of trespass was brought for the destruction of a house of ill fame by the city marshal of Detroit, acting in pursuance of a city ordinance authorizing him to proceed with sufficient force and demolish the same. "It is said," observed WHIPPLE, J., delivering the opinion of the court, "that the house was a nuisance. This may be very true; but it was a nuisance in consequence of its being the resort of persons of ill fame. That which constitutes or causes the nuisance may be removed; thus if a house is used for the purposes of a trade or business by which the health of the public is endangered, the nuisance may be abated by removing whatsoever may be necessary to prevent the ex

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ercise of such trade or business ; so a house in which gaming is carried on to the injury of the public morals ; the individuals by whom it is occupied may be punished by indictment and the implements of gaming removed ; and a house in which indecent pictures are exhibited is a nuisance which may be abated by the removal of the pictures. . . . Yet in this and the other cases stated, it will not be contended that a person would be justified in demolishing the house, for the obvious reason that, to suppress the nuisance, such an act was unnecessary. . . . So in the case before us the nuisance was not caused by the erection itself, but by the persons who resorted there for the purposes of prostitution." In *Moody v. Supervisors of Niagara County*, 46 Barb. 659, an action was brought for the destruction of a bawdy-house which was likewise the resort of thieves, robbers and murderers, and it appeared that immediately before its destruction one of the police was murdered by the people congregated there. It was there held that the fact that a house is kept as a house of public prostitution renders it a common nuisance — but that a house cannot be lawfully destroyed by a mob because for the time being it is devoted to a purpose which the law characterizes as a common public nuisance ; when it is the unlawful use of a building that constitutes a nuisance the remedy is to stop such use, not to tear down and demolish the building. In *Gray v. Ayres*, 7 Dana, 375, it was held that what constitutes the nuisance should be abated, but not by the destruction of the house, the use of which and the practices therein constituted the nuisance, and not the house itself. "Although," remarks MARSHALL, J., "the destruction of the house might have been the most effectual mode of suppressing the nuisance, yet the house itself was not a nuisance, nor necessarily the cause of one, its destruction was not a necessary means of abating the nuisance, and as the right of abating is confined to that which is the nuisance, or which actually produces or must necessarily produce it, the right upon the case made out in the plea did not extend to the destruction of the house." In *Ely v. Supervisors of Niagara Co.*, 36 N. Y. 297, a similar case of the destruction of a house of ill fame came before the court. "The property of the plaintiff was not put beyond the pale of the law's protection," remarks SCRUGHAM, J., "by her detestable and criminal conduct. She still had the right to expect and rely implicitly upon the zeal and ability of the proper officers to defend her house and furniture against the unlawful efforts of any public indignant her evil practices might provoke." The same views are fully sustained in Massachusetts by the opinion of SHAW, C. J., in *Brown v. Perkins*, 12 Gray, 89, and in Rhode Island by that of AMES, C. J., in *State v. Paul*, 5 R. I. 185.

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When it is the use of the building which constitutes the nuisance, the abatement consists in putting a stop to such use. The law allows its officers, in execution of its sentence only to do what is necessary to abate the nuisance and nothing more: *a fortiori*, it will not sanction destruction without limit by individuals. It would be absurd to hold that a manufactory lawful in itself, but producing "offensive smells," is at the mercy of every passer-by, whose olfactory nerves are disagreeably affected by its necessary processes.

Even if this was a case in which those specially aggrieved by the plaintiffs' factory would have the right to abate the alleged nuisance, yet as it does not appear by whom its destruction was caused, it cannot appear that it was caused by those who were so situated in reference to it that they would have the right of interference, if there was such a right.

The decisions to which the learned counsel for the defendants in his able and elaborate argument has called our attention will not be found upon examination adverse to the conclusions to which we have arrived. In *Underhill v. Manchester*, 45 N. H. 214, a suit was brought against the defendant town for the damages caused by the destruction of the plaintiff's property by a mob. The plaintiff kept a saloon. The property destroyed consisted of spirituous liquors, the fixtures of the bar, and the furniture of the saloon. The court held the plaintiff could not recover, because his business led to drunkenness and disorder, and by the provisions of the "act making cities and towns liable for damages caused by mobs or riots" it is provided that "no person or persons shall be entitled to the benefits of this act, if it shall appear that the destruction of his or her property was caused by his or their illegal or improper conduct." The court held that "the illegal and improper conduct" of the plaintiff in keeping a grog shop, was to be regarded as the cause of the destruction of his property. Its decision is placed entirely upon the peculiar language of the statute. Doe, J., in his opinion, however, says that "the rioters are liable to the plaintiff for the damage done by them. His property, though solely used in violation of law, could not be lawfully destroyed except under process of law. *Brown v. Perkins*, 12 Gray, 89; *Woodman v. Hubbard*, 25 N. H. 67." But the peculiar language of the New Hampshire statute upon which alone the judgment of the court is based, is not to be found in our statutes, and without such statutory provision, it is obvious that the views of that court are in accordance with those we have expressed. In *Spalding v. Preston*, 21 Vt. 9, an action of trover was brought for counterfeit coin partly finished against the sheriff by whom they had been seized under process and detained to be used as evidence upon the trial of an indictment against the person in whose possession they were

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found, and likewise to prevent their being put in circulation, but the court held the action was not maintainable. "Such property," remarks REDFIELD, J., "so to speak is outlawed, and is common plunder." Counterfeit money is *per se* unlawful, but porgy oil is an article of commerce, and its manufacture an honest and lucrative industry. In *Meeker v. Van Rensselaer*, 15 Wend. 397, the destruction by individuals of a dwelling-house, during the prevalence of the Asiatic cholera, which was cut up into small apartments, inhabited by poor people in a filthy condition and calculated to breed disease, was sanctioned on the ground that it was a nuisance and "that there was no other way to correct the evil but by pulling down the building." But this case has been doubted in *Welch v. Stowell*, 2 Mich. 332, and in a subsequent case in New York, the court say that it can only be sustained on the ground that in no other way could the safety of the public be preserved. In *Lord v. Chadbourne*, 42 Me. 429, a suit was brought for the value of liquors kept for sale in violation of the statutes of the State, and it was held not maintainable, among other reasons, because it was provided by statute that "no action of any kind shall be maintained in any court in this State either in whole or in part for intoxicating or spirituous liquors," etc. The *status* of the liquors was illegal. They were held for illegal purposes, and with the design of violating the statute. Not so in this case. The plaintiff was engaged in lawful business. If the place of his manufacturing was improper, that was to be determined by a jury, not by a mob of men in disguise. In *Sherman v. Fall River Iron Works Co.*, 5 Allen, 213, it was decided that an unlicensed keeper of a livery stable could not recover for damages to his business by the escape of gas through the ground and into a well of water upon his premises, though he might for the nuisance to his real estate. To be legally recognized as keeper of a livery stable he must have a license, but no license is required for manufacturing porgy oil. True, the municipal officers of a town or city by chapter 17, section 6, may assign a place for the exercise of any trade or employment specified in section 5, "when they judge it necessary," but it nowhere appears that there has been any adjudication of such necessity.

[The court then passed upon some minor points.]

The defendants offered to show that the plaintiffs' factory was "a public nuisance, and a nuisance to the people residing in the vicinity, but all evidence to show the factory a nuisance was excluded."

It is urged that this evidence should have been received as tending to show contributory negligence on the part of the plaintiffs. In *Moody v. Supervisors of Niagara County*, 46 Barb. 659, evidence was offered that the house destroyed was one of ill fame, and that its destruction was

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caused by excitement arising from the murder of one of the police in it, but the court excluded the evidence because it would constitute no defense. In *E'y v. Supervisors of Niagara County*, 36 N. Y. 297, a house of ill fame was destroyed by a mob, and the point was taken and the evidence offered to show the character of the house was excluded, and the exclusion was sustained. "She" (the plaintiff), observes SCRUGHAM J., "was not to assume that the officers would or could not perform their duty effectually, and, therefore, having no reason to fear the injury or destruction of her property by a riot or mob, she was not careless or negligent in not anticipating that such would be the result of the evil use to which she applied the property. . . The conduct of the plaintiff was not such a cause as would naturally produce or aid in producing the destruction of her property; and its influence in that direction is too remote and uncertain to prevent its being considered such carelessness or negligence as would bar her recovery. All that her conduct can strictly be claimed to have produced was local public indignation; and this, lawfully manifested, would not have occasioned or in any manner aided in the destruction of her property." Much more then, cannot the plaintiffs be regarded as guilty of contributory negligence when engaged in a lawful business, if those engaged in an infamous violation of law are not so regarded. To hold that these plaintiffs are guilty of contributory negligence because they were engaged in a manufacture which was or might be a nuisance, would be to declare judicially that all persons engaged in a "trade, employment or manufacture" referred to in chapter 17, section 5, were guilty, by the very fact of being engaged in such trade, employment or manufacture, of such contributory negligence, that they are without the protection of the law, and that by being engaged in such business they were laying the foundation of and contributing to its destruction.

The evidence offered was not admissible to show contributory negligence on the part of the plaintiffs.

The defendant's counsel requested the court to instruct the jury that "if plaintiffs were maintaining their factory with their stationary steam engine without license therefor, they were without legal right so to do; and if they were entitled to recover at all, the measure of damages is three-fourths of the actual value of the property, and not three-fourths of what it might be worth for such use at that place, if they had a right to use it."

This instruction was not given, but the jury were instructed "that if they found for the plaintiffs, the measure of damages was three-fourths of the actual value of the property at the time it was destroyed." The

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indemnity given by the statute (ch. 123, § 8), is three-fourths of the value of such injury to his property as the plaintiff may have sustained. Here the injury arose from the destruction of property. The persons by whom the property was destroyed would be responsible for its actual value. They are wrong-doers and the possibility of an indictment of the owner is neither excuse nor palliation for them. Abatement by destruction of the plaintiffs' factory and engine would not have been ordered by the judgment of the court; its use might have been prohibited and a fine imposed, but purification by fire is not one of the statutory penalties. The abatement could only be legally made by the judgment of the court upon an indictment in which the parties interested would have a right to appear and defend. The possibility of an indictment is not a contingency, as affecting value, of which a mob could avail itself in reduction of damages. Neither can the defendants, whom the statute has made responsible for the action of such mob.

Exceptions overruled.

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

SOMES v. WHITE.

(65 Me. 542.)

Shipping — collision — liability of general owner.

The general owners of a vessel are not liable for damages occasioned by a collision, happening through the fault or negligence of the master of the vessel who controls her *pro hac vice* and is sailing her "on shares."

ACTION on the case against the defendants as general owners of the schooner "Midnight," by the plaintiffs as general owners of the schooner "Thames."

It is agreed that both vessels were sailed on shares by their respective masters, and under their control, as is customary in such cases in this State; and the question submitted is whether, under such circumstances, an action for collision by the general owners of the "Thames," against the general owners of the "Midnight," can be maintained in this court.

If maintainable, the action to stand for trial; if not, plaintiffs to be nonsuit.

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A. Wiswell & A. P. Wiswell, for defendants.

E. Hale & L. A. Emery, for plaintiffs.

PETERS, J. The case finds that the master had the control of the defendants' vessel, sailing her on shares. Nothing else appearing, this would constitute him an owner thereof, *pro hac vice*. This has ever been the doctrine of this court. For recent adjudications affirming the principle, see *Bonzey v. Hodgkins*, 55 Me. 98 ; *Tucker v. Stimson*, 12 Gray, 487.

The plaintiffs admit it to be well settled, that in such a case the general owners are not, ordinarily, liable for the contracts made by the master concerning the sailing and management of the vessel. But they contend that in case of collision they are liable for the master's fault or negligence. They argue that there is a reasonable distinction between claims against owners for the acts of a master arising from his contracts and such as are founded strictly in tort.

We do not assent to the correctness of the position of the plaintiffs. We do not perceive by what principle or rule it can be maintained. A personal liability of owners for the master's defaults, certainly must depend upon the fact, whether the relation of master and servant (or principal and agent) exists between themselves and the master or not. The liability must arise under the maxim *respondeat superior* if at all. But where the master is owner *pro hac vice*, no such relation exists. That is the very point established in the cases before referred to. Those cases turn upon the exact finding, that the master is not the agent or servant of the owner. Claims against the owner for the obligations of the master, whether arising *ex contractu* or *ex delicto*, stand upon the same foundation ; when this is removed there can be no liability at all.

The plaintiffs seek to avoid the effect of this reasoning, by attempting to draw a distinction between the liabilities attaching to the possession and control of ponderous property like a ship and articles of ordinary consequence like a carriage or coach. The argument is, that the general owners can be easily ascertained ; that their names are upon the papers of the ship ; that third persons can protect themselves, in dealing with the captain, by caution and inquiry, as far as contracts are concerned ; but cannot protect themselves against the negligence and fault of the master in the conduct of the vessel, and that upon the grounds of public convenience and policy the apparent owner should be liable therefor.

But the argument is more plausible than sound. There was formerly an inclination in the courts to apply such a rule to the owners of real estate occupied and controlled by tenants, and for the same reasons that

are urged for its application in the case of vessels. But, as applied to real estate, the doctrine has been rejected of late years by most courts, and emphatically so by our own court in *Eaton v. E. & N. A. R. R. Co.*, 59 Me. 520. Still, there is more reason for adopting the policy contended for, in the matter of real estate than in that of vessels. We do not see why the owners of the vessel, who are out of the possession and control of her, should be liable for injuries caused by collision, any more than the owners of the cargo should be liable therefor. And it is always conceded, even in the courts of admiralty, that the owners of cargo are not liable to any extent in such a case, notwithstanding the vessel at the time of the collision is pursuing a voyage under a charter-party with the owners of the cargo and carrying their property alone. But the master, while owner *pro hac vice*, is no more the agent of the general owners of the vessel, than of the owners of the cargo. Both the vessel and the cargo are under his possession and control for the time being. By the maritime law, the vessel is made a surety for the protection of all persons against the negligence of the master while conducting the vessel, when he is the charterer thereof, and that would seem to be protection enough. The exigencies of trade and commerce require no more.

The present statutes of this State and of the United States, affecting the rights and remedies pertaining to ownership in vessels (which we have no space for here), strongly militate in their force and effect against the argument of the plaintiffs. See R. S. of Me., ch. 36, §§ 5 and 6; R. S. of U. S., § 4282 and five succeeding sections.

Nor is the plaintiffs' position sustained by the decided cases to any extent. The exact question presented here arose in *Thorp v. Hammond*, 12 Wall. 408, but no decision was reached, as the court were evenly divided. There may be found some *dicta*, favorable to the plaintiffs' view, in some of the early English cases, but mostly before the doctrine of *pro hac vice* ownership was fully accepted by the English courts. See Ab. Sh. 57, and notes.

There are many analogous cases where the principle under discussion may be regarded as affirmed adversely to the plaintiffs in this case. Thus, it is decided, that general owners out of possession are not liable for supplies purchased by the master for the vessel; nor for repairs ordered by him without their authority; nor for his neglects in the performance or non-performance of his charter parties; nor for his embezzlements of the cargo of shippers. In *Sproat v. Donnell*, 26 Me. 185, it was held that, when a vessel was sailed on shares, the general owner was not liable to the owners of a cargo of lumber shipped on board for a

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part of it used as fuel during the voyage. In *Sproul v. Hemmingway*, 14 Pick. 1, "it is decided that the owner of a brig, which came in collision with a schooner while the brig was being towed by a steamer over which the brig had no control, was not responsible for the damages sustained by the schooner. That case is exceedingly like this case. In the case of the *R. B. Forbes*, Sprague's Decisions, 328, it was determined by Judge SPRAGUE, that, where a ship without sails was lashed to a steamer alongside, and so towed, the steamer furnishing the whole motive power, and the ship came in collision with a sailing vessel, the steamer was responsible for the injury; and he left undetermined whether the ship was also liable (in admiralty) or not. *Fletcher v. Braddick*, 2 Bos. & Pul. 182, much referred to in subsequent cases, is not really an opposing authority. The result there turned upon the finding of the court that the ship should be considered the ship of the owners. She was chartered to the British government, and while, during her voyages, her destinations were controlled by government officers, the navigation of the ship was managed by owners who hired and paid the master and crew.

Similar contracts of letting were made during our late civil war, between owners of vessels and the United States, and in several cases of collision the owners were held responsible for injuries, upon the ground that the management of the navigation of the ship was not within the control of the United States, so as to constitute the government, *pro hac vice*, owners thereof. *Leary v. United States*, 14 Wall. 607. In *Skolfield v. Potter*, Davis, 392, it was maintained by Judge WARE, that owners should be responsible at least for sailors' wages although out of possession of their ship. But even an exception to this extent was disapproved in the case of *Giles v. Vigereaux*, 85 Me 300.

It will be found upon an examination of still other authorities that in the cases where the responsibility of the owners has been sought to be maintained, the inquiry has almost universally been, whether, under the contract of letting, the master or the owners had the possession, command and navigation of the ship. There can be no difference in this respect between a ship and any other species of personal property. The law of principal and agent cannot be applied where no agency exists. Owners are not answerable for a collision which in no sense is directly or indirectly caused by themselves. 3 Kent's Com. 194; *Blanchard v. Fearing*, 4 Allen, 119; *Webb v. Peirce*, 1 Curtis' C. C. R. 104; *Scott v. Stark*, 2 Stark. 438; *Hutton v. Bragg*, 7 Taunt. 14; *Fenton v.*

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The City of Dublin Steam Packet Company, 8 Ad. & E. 838. In *Hutton v. Bragg*, *supra*, DALLAS, J., says: "It may be considered that the charterer of a ship is during the existence of the charter-party to all intents and purposes the owner of the ship." In the last case above cited (a case of collision) PATTERSON, J., says: "The issue is whether the owners had the possession and care of the vessel; which brings us back to the question, whose servants were the crew."

The authorities both English and American, touching the question presented for our decision, with but very little exception, strongly incline the same way. *Plaintiff's nonsuit.*

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

 CARD V. CITY OF ELLSWORTH.

(65 Me. 547.)

Highway — obstruction in — when town liable for injuries occasioned by.

Plaintiff's horse became frightened by a rock lying in defendant's highway in a situation calculated to frighten horses, and plaintiff in attempting to dismount was injured. *Held*, that if the horse was unmanageable and plaintiff was dismounting to avoid danger, defendant was liable, but that if the horse was manageable and plaintiff dismounted to avoid apprehended difficulty, the defendant was not liable. *Held*, also, that the defendant was liable for an injury occurring from the fright of the horse at the rock, although neither the horse nor the carriage came into contact with the rock, the horse being ordinarily safe and gentle.

CASE, for an alleged injury to the female plaintiff by means of a defect in the highway, stated in the report thus:

"She was riding with a young woman in a wagon, and came upon a place where a large rock had been raised by the defendants from the ground, and remained within the traveled way, in such a position as to be calculated to frighten a horse such as the parties were then driving, going within a rod or so of the obstruction. The horse being frightened, and unwilling to pass the obstruction, the young woman got out and took the horse by the head, and while the plaintiff was getting out, the horse started and threw her from the wagon, and she was injured thereby.

No question is made but that the rock was a defect in the highway, which the defendants were bound to keep in repair, or, about notice; and it is admitted that the plaintiff and the persons with her were in the use

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of common care and prudence in all that was done by them at the time; and no question is made as to the suitability of the horse and team used at the time.

The plaintiff contends that she was getting out of the wagon to save herself from the danger of injury by an upset liable to be occasioned by the horse being restless and unmanageable.

The defendants contend that the plaintiff was in the act of getting out of the wagon, in order to have the horse led toward the obstruction, and that the horse was not at that moment unmanageable, although he made a step which threw the plaintiff down as she was attempting to get out.

It is admitted that neither the horse nor the wagon came in actual contact with the rock.

If the action is not maintainable upon the facts as contended for by the plaintiffs, because there was no actual collision or contact with the rock, then a nonsuit is to be entered.

But if an action is maintainable upon the facts as contended for by the plaintiffs, and not maintainable, provided the facts as contended for by the defendants are true, then the action is to stand for trial, in order to submit the facts in dispute to a jury.

And if the action is maintainable upon the facts, as the defendants claim them to be, then a default is to be entered, and the damages to be assessed by a jury, unless a reference or a commission shall be agreed upon."

A. Wiswell & A. P. Wiswell, for plaintiff. The plaintiff's right to recover is not affected by his or her having contributed to the injury unless he or she was in fault in so doing. *Shearm. & Redf. on Neg.* 31, and cases there cited. It is not necessary that there should be actual contact of the horse or carriage with the obstruction. *Lund et ux. v. Tyngsboro*, 11 Cush. 563. Objects in a highway likely to frighten horses of ordinary gentleness may be nuisances. *Ayer v. Norwich*, 39 Conn. 376; S. C., 12 Am. Rep. 396; *Dimock v. Suffield*, 30 id. 129. Objects within the limits of a highway, which in their nature are calculated to frighten horses of ordinary gentleness, may be nuisances which make the highway defective within the meaning of the statute. *Morse v. Richmond*, 41 Vt. 435; *Bartlett v. Hooksett*, 48 N. H. 18; *Foshay v. Glen Haven*, 25 Wis. 288 (3 Am. Rep. 73); *Shearm. & Redf. on Neg.*, § 388, and decisions referred to. It is there said: "Some recent decisions in Massachusetts tend to a different conclusion, but they stand alone, and their reasoning does not enforce our conviction of their soundness."

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E. Hale & L. A. Emery, for defendants, relied upon these three propositions. I. The rock, in its quality as a defect in the road, did not frighten the horse, but the fright was by some other quality of the rock.

II. Upon the defendants' theory, the rock was not the proximate cause, and the plaintiff must disprove the defendants' theory before she can recover.

III. Upon the defendants' theory, the rock was not any cause at all, and the plaintiff must disprove this theory before going on.

The statute imposing liability upon towns is penal, as well as remedial, and is to be construed strictly. *Moore v. Abbott*, 32 Me. 46; *Moulton v. Sanford*, 51 id. 127. The defect or want of repair is either inert matter left incumbering the street upon or over it, or structural defects endangering the public travel. An object frightening horses is not necessarily and *ipso facto* a defect, within the meaning of the statute. *Davis v. Bangor*, 42 Me. 522. The fact that the horse was frightened at the appearance of an object does not render that object a defect within the meaning of the statute. *Merrill v. Hampden*, 26 Me. 234. The reported cases in this State are cases of actual contact. So also in these cases in Massachusetts. *Keith v. Easton*, 2 Allen, 552; *Kingsbury v. Dedham*, 13 id. 186. Though the object frightening the horse was also an obstruction, yet if its quality as an obstruction did not frighten the horse, the town is not liable. *Cook v. Charlestown*, 98 Mass. 80; *Cook v. Montague*, 115 id. 571. In *Lund v. Tyngsboro*, the plaintiff jumped to avoid a collision; that is, to avoid the thing as a defect, an obstacle to travel.

The rock was perhaps the remote cause of the injury, but it was not the proximate cause. *Bigelow v. Reed*, 51 Me. 325. The maxim of proximate cause is applied more rigorously in statute torts than in common-law torts. *Moore v. Abbott*, 32 Me. 46; *Moulton v. Sanford*, 51 id. 127; *McDonald v. Snelling*, 14 Allen, 290. The obstruction must be something more than the occasion, it must be the cause. *Livie v. Janson*, 12 East, 648; *Smith v. Lee*, 14 Gray, 473; *Jenks v. Wilbraham*, 11 id. 142; *Marble v. Worcester*, 4 id. 395; *Libbey v. Greenbush*, 20 Me. 47.

PETERS, J. In our opinion the defect in the way was the proximate cause of the injury, if the facts are as the plaintiff claims them to be. The travelers had no knowledge of the defect in the way until they came upon it. The horse becoming frightened and unmanageable, the female plaintiff was getting out of the wagon, to avoid the threatened danger, when the accident occurred. She was in the use of common

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care in doing so. We think this statement brings the case within the principle of *Lund v. Tyngsboro*, 11 Cash. 563, and of *Page v. Bucksport*, 64 Me. 51; S. C., 18 Am. Rep. 239. In the series of antecedent events, the act done through the agency of the defendants is the only act occasioned by negligence. Neither the horse nor the driver was in fault. That act was the moving and controlling cause of the accident. The other events were agencies only, through which it operated. *Bigelow v. Reed*, 51 Me. 325; *Lake v. Miliken*, 62 id. 240; S. C., 16 Am. Rep. 456.

But it is otherwise, if the facts are as the defendants claim them to be. If the horse was at rest and manageable, and the persons traveling got out of the wagon, apprehending difficulty in driving the horse by the obstruction, and the horse (not from any fright) started up as the plaintiff was dismounting, and an injury thereby happened to her, we do not think that in such case the defect could be considered the proximate cause of the injury. In that case, no one was in fault. It was a casualty and misfortune merely. The rock in the road had no direct agency in causing the horse to start too quickly. Undoubtedly the defect in the way was one of a series of events or things without which the accident would not have happened; but it was not the "juridical cause" of it. This is made clear by a reference to the discussions in such analogous cases as *Tisdale v. Norton*, 8 Metc. 386; *Donney v. N. Y. Central R. R. Co.*, 13 Gray, 481; *Hoadley v. Northern Transportation Co.*, 115 Mass. 804; S. C., 15 Am. Rep. 166; and numerous other cases.

The other question in the case is, whether the defendants are liable for an injury occurring from the fright of the horse at the rock, neither the horse nor the carriage coming in collision or contact with the rock. Upon this point the weight of authority is with the plaintiff. There are able opinions in that behalf in the courts of New Hampshire, Vermont, Connecticut, and of several other States. The same doctrine is also advocated in several respectable legal treatises. *Bartlett v. Hooksott*, 48 N. H. 18; *Morse v. Richmond*, 41 Vt. 435; S. C., *Dimock v. Suffield*, 30 Conn. 129; *Ayer v. Norwich*, 39 id. 376; 12 Am. Rep. 396; *Foshay v. Glen Haven*, 25 Wis. 288; S. C., 3 Am. Rep. 73; *Shearm. & Redf.* on Neg. 81; *Angell on Highways*, § 261.

The inclination of the court in Massachusetts, as exhibited in the earlier cases, was apparently favorable to the same view. In *Howard v. North Bridgewater*, 16 Pick. 189, 190, the court say, "but there may be such obstructions out of the traveled path as will render the road unsafe; such, for instance, as would frighten horses." But in the later

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cases, the opinion of that court, upon the exact question presented here, as well as upon other questions more or less like it, has been most unequivocally the other way. In *Keith v. Easton*, 2 Allen, 552, it was decided, that an incumbrance "upon the side of a way" was not a defect in the way, merely because it exposes the traveler's horse to become frightened by the sight of it, or by sounds or smells issuing from it. In *Kingsbury v. Dedham*, 13 Allen, 186, the application of the same doctrine was extended to a case where the object at which the horse took fright was within the traveled way, and was of a nature calculated to frighten horses, but was not *per se* an actual defect or incumbrance in the way of travel. In *Cook v. Charlestown*, 98 Mass. 80, it was held that the town was not liable, even though the incumbrance at which the horse became frightened, was in the traveled part of the way, and was of itself an obstruction and defect therein. There was in that case no collision with the obstruction itself, and the accident occurred at a point in the road where there was no defect. *Cook v. Montague*, 115 Mass. 571, is to the same effect. Still, individuals who have or maintain upon the highways obstructions which caused fright in horses are held, in Massachusetts, responsible to travelers for injuries occasioned thereby. *Barnes v. Chapin*, 4 Allen, 444; *Jones v. Housatonic Railroad Co.*, 107 Mass. 261. And, in the same State, it has been held that a town may be answerable for damages where an injury is caused by a horse shying at one defect, and the carriage hitting the same or some other defect, upon the highway. *Bigelow v. Weston*, 3 Pick. 267; *Bly v. Haverhill*, 110 Mass. 520; *Woods v. Groton*, 111 id. 857.

In our own State, there are but few cases where the question is touched. *Cobb v. Standish*, 14 Me. 198, is a novel case where the proposition under discussion is reversed. There the horse was ensnared into a miry pit, instead of being frightened from it. The town was held because the indications of danger were concealed from the notice of the traveler and his horse. It was decided in *Merrill v. Hampden*, 26 Me. 234, that if a hole in the road was filled up with stones before the accident so as to be safe for the horse and carriage to pass over, the fact that the horse was frightened at its appearance would not render the town liable for an injury happening on that account. But it is intimated in the opinion, that there might be conditions in the highway for which a town would be responsible, where an injury is caused by a horse taking fright at the appearance of the road. *Lawrence v. Mt. Vernon*, 35 Me. 100, was the case of an injury by a horse taking fright at a pile of shingles on the side of the road outside of the traveled way. The judge at the trial instructed the jury that if the shingles were of a character likely

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to frighten horses they were a defect in the public way. The court say that the instruction withdrew from the jury the determination of a question of fact. No other criticism is passed upon that instruction. In *Davis v. Bangor*, 42 Me. 522, it was decided that a tree standing upon a cart upon a public way was not an incumbrance for which the town was answerable to a traveler whose horse became frightened thereat and ran away. In that case no notice appears to have been taken by counsel or court of any distinction on account of the injury being caused by the fright of the horse at, instead of by a collision with, the supposed defect. In *Clark v. Lebanon*, 63 Me. 393, it was determined that a town is liable where the injury was caused by a horse running away on account of a fright produced by the carriage to which the horse was attached coming in collision with a defect in the way. That case very strongly resembles the case at bar. There the horse became alarmed through the sense of touch. Here he became alarmed through the sense of sight. There is no other difference or distinction between the cases. *Jewett v. Gage*, 55 Me. 538, is a case where an individual was held liable for an object in the highway which caused an injury to a traveler by frightening his horse.

We think, upon the plaintiff's showing, this action can be maintained. It is a strong case of the kind. The horse was suitable. The driver used proper care. The object which produced the fright was in the traveled way. It was *per se* an incumbrance upon and a defect in the way. It was an object likely to terrify a horse. The roads are required to be "kept in repair so that they are safe and convenient for travelers with horses, teams and carriages." It is admitted that the road was not "in repair." Was it safe and convenient? Of course, a town is not accountable for every obstruction upon its highways which would produce fright in horses, nor merely because the road is not safe and convenient. It is impossible to define the municipal obligation by any general rule. Each case must depend somewhat upon its peculiar facts. Of course, whether a road is or not out of repair is generally for the jury to decide. But there are certain conditions of a road which cannot legally be regarded as defects; such as, because the road is hilly; or not all wrought; or because crowded with persons or teams; and there are other classes of cases where no liability can exist. Illustrations of many such are given in *Keith v. Easton*, *supra*.

We are not convinced, however, that a recovery can be had in no case where the injury is caused by the fright of a horse at an object upon a highway. Fear is not a despicable quality in the character of man or

beast. "Fear has many eyes." "Early and provident fear is the mother of safety." It was fear that impelled the traveler (*Lund v. Tyngsboro, supra*) to leap from his carriage to avoid a dangerous defect in the way, when his safety really depended upon his remaining in the carriage. The passenger who jumped from a coach through fear of his safety and thereby received an injury, made the same mistake. *Ingalls v. Bills*, 9 Metc. 1. But in those cases the defect was regarded as the responsible cause of the injury.

The defendants insist, that the accident is not imputable to the fact that the rock was in the traveled way. They say, that, if it had been situated on the side of the road or just outside of the limits of the road, the result would or might have been the same. In *Cook v. Charlestown, supra* (Massachusetts case), it is said: "There is nothing to show that the horse was more frightened than he would have been if it (obstruction) had lain close besides his path, instead of directly in it." The defendants also rely on the argument, that innumerable things on and about a highway may annoy and frighten a horse which cannot be regarded as defects for which a town would be responsible, and that for that reason in this particular class of cases there should be no liability upon the town at all. While these suggestions would have considerable force in many cases, they do not furnish any defense under the particular circumstances of the case at bar. *Non constat*, that the result would have been the same under the conditions supposed. We think the more reasonable presumption in this case to be, that the horse would have gone safely along had the impediment not been in the traveled way. Nor does it follow that a town may not be responsible for some objects, because they are not responsible for all objects, in the highway which detract from the convenience and safety of traveling.

How far, if at all, the court would be inclined to admit the doctrine adopted in this discussion beyond the facts now before us, we cannot now decide. But in no case like this can a liability of the town exist, unless the object of fright presents an appearance that would be likely to frighten ordinary horses; nor unless the appearance of the object is such that it should reasonably be expected by the town that it naturally might have that effect; nor unless the horse was, at least, an ordinarily kind, gentle and safe animal, and well broken for traveling upon our public roads.

The action to stand for trial.

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

Dutton v. Simmons.

DUTTON v. SIMMONS.

(65 Me. 583.)

Misnomer — Christian name — initial letter — return of sheriff — when not conclusive.

The name of the defendant in a writ of attachment was Henry F. Hawkins, but the sheriff certified to the register that he had attached the property of Henry M. Hawkins. *Held* such a misdescription as to render the attachment void, and that the sheriff's return that he had duly certified the attachment to the register according to law might be contradicted by producing the certificate.

ACTION to recover real property. Both parties claimed through Henry F. Hawkins, the plaintiff, directly by deed; the defendant by a deed from Bradstreet M. Hawkins, levying judgment creditor of Henry F. The levy, if all proceedings were regular, gave the earlier title. The officer's return upon the back of the writ, *Bradstreet M. Hawkins v. Henry F. Hawkins*, showed an attachment of the real estate of the defendant seasonably made, the parties correctly described, and the return required by R. S., ch. 81, § 56, to the registry; but the plaintiff, against the defendant's objection, put in a copy of the officer's return left with the register of deeds, and the indorsement thereon, and the entry of the same attachment in the attachment book, wherein it appeared that the officer having the writ in that case, in his return to the registry, gave the name of the defendant as Henry "M." Hawkins, instead of his true name, as it appeared in the writ, Henry "F." Hawkins. This error raised the contention in the case which after the evidence was out was made law upon so much thereof as was legally admissible.

J. Williamson, for plaintiff.

N. Abbott, for defendant.

PETERS, J. Both parties claim title to the demanded premises through Henry F. Hawkins. The deed to the demandant was prior to the levy of the tenant, but subsequent to the attachment on which the levy was made. The demandant, however, claims that the attachment was defective, because in the return of the officer to the registry of deeds, the defendant in that suit was described as Henry "M." Hawkins, when his true name was Henry "F." Hawkins, by which latter name he was sued. The question is, therefore, whether the misdescription is such as to render the attachment void.

The "names of the parties" to the suit were required to be returned.

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Can the name Henry "M." Hawkins be taken to mean Henry "F." Hawkins? Formerly, but one Christian name was known to the law. The omission or insertion of a middle name, or its initial, was regarded as immaterial. Such is, probably, the law of the Supreme Court of the United States, and of many, if not most, of the State courts in this country at the present day. *Games v. Stiles*, 14 Peters, 322; *People v. Collins*, 7 Johns. 549. But there has been a growing dissatisfaction with the doctrine of the ancient cases upon this subject; and in this State (and Massachusetts) the old doctrine must be regarded both by the precedents and practice as overruled. In Bishop's *Crim. Law*, *Misnomer*, may be found cited many of the cases upon the question *pro* and *con*. The English courts have also long since departed from the old rule, under the influence of some of their statutes of amendment. In *Com. v. Hall*, 3 Pick. 262, "Charles" Hall and "Charles James" Hall are regarded as different names. *Com. v. Shearman*, 11 Cush. 546, decided that "George" Allen and "George E." Allen are not the same name. "Nathan" Hoard and "Nathan S." Hoard are not the same name. *Com. v. McAvoy*, 16 Gray, 235. There are many other Massachusetts cases either directly or indirectly supporting the same view. In this State the cases of *State v. Homer*, 40 Me. 438, and *State v. Dresser*, 54 id. 569, are to the same effect. It is also with us well settled that a person's middle name may be represented by its initial letter instead of writing the name in full. That is almost a universal practice. There was a distinction in some of the English cases depending on the fact whether the middle initial was a vowel or not. If it was, it was regarded as a name of itself. But if a consonant it was not a name. This nice distinction was grounded upon the idea that a vowel can be sounded by itself, but that a consonant cannot be sounded without the aid of a vowel. But this attempted distinction did not receive much recognition in the courts of that country, and has received none in the American courts, that we are aware of. *Arbousin v. Willoughby*, 1 Marsh (E. C. L.), 477; *Lindsey v. Wells*, 3 Bing. N. C. 177; *The Queen v. Dale*, 17 Ad. & E. (N. S.) 63; *Kinnersley v. Knott*, 7 Mann. G. & S. 980; *Regina v. Avery*, 18 Ad. & E. (N. S.) 576. See *Kelly v. Laws*, 109 Mass. 395.

The tenant claims that the name is described in the return with substantial correctness, and that the error is one of inaccuracy only and not fatal to the validity of the attachment. He would have had, probably, less difficulty to contend with, had the error been the omission of the middle letter (as if written Henry Hawkins), or if only the initial of the Christian name had been written, but correctly given (as H. F. Hawkins). In such case perhaps the omission could have been supplied by parol

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proof. A person may have different names by reputation. Proceedings have been sustained in important cases where a person is described in either one or the other of the above ways. *State v. Taggart*, 38 Me. 298; *Hubbard v. Smith*, 4 Gray, 72; *Collins v. Douglass*, 1 id. 167; *Commonwealth v. Gleason*, 110 Mass. 66; *Regina v. Avery*, *supra*. But those are cases where the description of the person is said to be inaccurate or incomplete merely. Lord CAMPBELL, C. J., in one of the cases before cited, says: "It may be said, initials are a short way of stating the Christian name." But the description of Hawkins in the officer's return was not a diminished one, correct as far as it went, and inaccurate merely, but it was essentially and positively false. It may have been caused by a slip of the pen, but as there is no power of amendment in the case we see no remedy for it. It is not a misdescription so patent upon the face of the papers as to correct itself. *Nye v. Drake*, 9 Pick. 35; *Litchfield v. Cudworth*, 15 id. 23; *Slasson v. Brown*, 20 id. 436; *Commonwealth v. Mehan*, 11 Gray, 321; *Frost v. Paine*, 12 Me. 111. We think that Henry "F." Hawkins and Henry "M." Hawkins are not the same name.

Deciding the foregoing point as we do, brings before us another question, and one of much practical importance. The officer's certificate of the registry of deeds was admitted in evidence to contradict his return upon the writ. This was objected to. Was it admissible for that purpose? We think it was. It has been settled that it was the officer's duty to certify on the writ the fact that he had filed an attested copy with the register of deeds, and that without it the attachment would be void. *Carleton v. Ryerson*, 59 Me. 438. (See 1 Allen, 61.) It is upon this ground that it is now contended that the evidence admitted should have been excluded. The argument is, that the officer's statement in his return upon the writ being necessary, it must be conclusive. There is no doubt that the estoppel must apply to the demandant in this case, if it does to the defendant in the suit where the attachment was made. If it applies at all, it must affect not only that defendant but his privies, and, as the demandant took his deed after the attachment, he would stand in the present suit in that attitude. *Bott v. Burnell*, 11 Mass. 163; *Campbell v. Webster*, 15 Gray, 28; *Angier v. Nash*, 26 N. H. 99.

The precise point in issue may never have been decided in this State. It was so understood by Justice KENT in *State v. Leach*, 60 Me. 58, p. 74. Still, we think several reported cases exhibit a strong leaning upon the point if not decisive of it. In *Nash v. Whitney*, 39 Me. 341, it was held (among other reasons), that an attachment was a nullity because the certificate filed in the registry did not contain the statements as re-

quired by law. The facts of the case are rather vaguely stated, and the evidence admitted was not (as here) objected to, although the point was made as to the conclusiveness of the officer's return on the writ. In *Kendall v. Irving*, 42 Me. 339, TENNEY, C. J., expressed an opinion that the attested copy left with the register would be the correct source of evidence from which the court could conclude whether an effectual attachment was made. In *Lincoln v. Strickland*, 51 Me. 321, a certificate to the registry was received in evidence and passed upon by the court, but the case does not show what the officer's return on the writ was, or whether the admitted evidence was objected to or not. In *Farris v. Rouse*, 52 Me. 409, an officer's certificate filed with the register of deeds was decided to be fatally defective, but the report of that case does not show whether the certificate was admitted in evidence with or without objection.

But upon principle, we are satisfied, the officer's return on the writ cannot control the certificate made and filed by him in the registry of deeds. It is undoubtedly a general rule of the common law, that the return of a sheriff on a process, except in relation to himself when sued, is absolutely conclusive. The rule is very general, but not universal. An averment, in rare instances, is permitted against the return of a sheriff, to avert certain hardships that would result from the general rule, as described in *Lewis v. Blair*, 1 N. H. 68. In examining the origin of the general rule, it will be seen that several causes in the cases (old and new) are assigned for it. We think none of them sufficient to require us "to give effect to an admitted falsehood," in the case at bar. One reason given (in old cases) is, that "the sheriff is a sworn officer to whom the law gives credit." But his return on the writ has no more the sanction of an oath, than his return to the registry has. If one return should be credited, so should the other be; and the manifestly correct one should control. Another reason assigned is, that an officer's return becomes "a parcel of the record," and the point is, that a record should not be contradictable by parol. *Gardner v. Hosmer*, 6 Mass. 325. But this argument fails here, for the reason that both the return to the registry, and the return upon the writ are of the nature of record evidence, and the return to the registry is the original of the two, the other being a mere certificate of what was done before. Besides, an officer is not permitted to make contradictory returns. It is of the earliest law, that a sheriff "cannot make a return contrary to a record, or contrary to his former return on record; as if he return upon a *venire facias* twelve jurors, he cannot say upon his *distringas*, that one *nil habet*." See Com. Dig., Return (E. 4.), where other illustrations are given. The present

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is an analogous case thereto to some extent. Here the officer returns to the registry in five days. He necessarily makes his return on the writ afterward. Should he be allowed to falsify his prior (*quasi*) record? Another reason anciently given, was upon the ground of "general convenience." If a return was *traversable*, "extreme inconvenience would result therefrom." This argument is perfectly convincing so far only as parol evidence is concerned. The demandant here seeks to defend, and not impeach a record. The case then not falling within the reason of the rule which excludes all contradiction of an officer's return, the rule does not apply.

The argument for this conclusion is strengthened by various considerations. The statute is mandatory. The return filed in the registry is to be the foundation on which the attachment rests. It is in terms made a condition precedent to the validity of the attachment. The object of the statute is that the records at the registry of deeds shall of themselves afford satisfactory evidence whether any incumbrance exists upon an estate or not. Other statutory provisions are based on this idea. An attachment may be dissolved by the plaintiff, or vacated by a court, by a certificate or bond filed in the registry. By the act of 1873 (ch. 128), a recorded deed must take precedence of an unrecorded attachment. It is a notable fact that the original act of 1838 provided that the officer's return, that he had filed the certificate in the registry of deeds, should be "sufficient" evidence that he had done so. That would be *prima facie* evidence, and not conclusive. Undoubtedly, the return on the writ is *prima facie* evidence of the truth of the facts legitimately stated therein.

The tenant sets up that the demandant's deed was obtained by fraud. That is not a question, ordinarily, for our inquiry. But the case furnishes no satisfactory evidence of fraud.

Judgment for demandant.

APPLETON, C. J., DICKERSON, DANFORTH, VIRGIN and LIBBEY, JJ.,
concurred.

CASES
IN THE
SUPREME COURT
OF
OREGON.

STATE v. BRUCE.

(5 Or. 68.)

Indictment — for illegal voting — when sustained after verdict.

Defendant was indicted for that he "did willfully, knowingly and unlawfully vote" at an election in a certain precinct, "having no lawful right to vote at said precinct," and "well knowing himself not entitled by law to vote thereat." *Held*, good after verdict; but that it would have been bad on demurrer for not showing the reason of the disqualification.

INDICTMENT for illegal voting. The indictment was as follows:

"Robert Bruce is accused, by the grand jury of the county of Multnomah, by this indictment, of the crime of voting illegally, committed as follows:

"The said Robert Bruce, on the 13th day of October, A. D. 1878, in the county of Multnomah and State of Oregon, in the precinct of East Portland, in said county and State, did willfully, knowingly and unlawfully vote at a legally authorized election, then and there being held for the purpose of electing a representative to the Congress of the United States, he, the said Robert Bruce, then and there having no lawful right to vote at said precinct of East Portland; and he, the said Robert Bruce, then and there well knowing himself not entitled by law to vote thereat, contrary to the statute," etc.

State v. Bruce.

Appellant, without objection to the sufficiency of this indictment, pleaded not guilty thereto, and upon the trial was convicted of the crime as charged. Thereupon, by his counsel, he filed a motion in arrest of judgment, and for a new trial, which, upon the hearing thereof, was overruled by the court, and he was sentenced to pay a fine of four hundred dollars.

The errors relied upon on the motion were: error in admitting in evidence, against the objection of appellant, the poll-books of South Portland, Morrison and Northeast Portland precincts; in admitting in evidence testimony tending to show that appellant voted on the 13th day of October, 1873, at the different precincts above named; in admitting testimony to show that the defendant was a citizen of the State of Oregon, and entitled to vote at any general or special election held therein.

Ball & Stott and C. W. Parrish, for appellant.

Durham & Thompson, for the State.

BONHAM, J. It is claimed by counsel for appellant in this case:

1. That the facts charged in the indictment do not constitute a crime.
2. That there was a fatal variance between the evidence adduced by the State and the allegations of the indictment.
3. That the court erred in admitting irrelevant testimony tending to show that the defendant voted at places in Multnomah county, on October 13, other than East Portland precinct.

These three propositions embrace all the questions necessary to be considered in this case, inasmuch as the other objection, that the verdict of the jury was against the evidence, could in no event be made available in the absence of a showing of all the evidence in the case, which the bill of exceptions does not pretend to give.

The statute upon which this indictment is based (Crim. Code, § 630) reads as follows: "If any person shall vote or offer to vote at any legally authorized election in this State, knowing himself not entitled by law to vote thereat, or shall vote or offer to vote at any poll or in any precinct at any such election, knowing himself not entitled by law to vote at such poll or in such precinct, such person, upon conviction thereof, shall be punished," etc.

It was conceded on the argument, and the bill of exceptions shows, that Robert Bruce, the appellant, was a lawful voter within the State of Oregon on the 13th day of October, 1873, and it would follow, under our Constitution and election laws, that he had the right on that day to

cast one vote at any voting precinct within the State for representative in Congress, provided there was a legally authorized election for the same then held.

In view of these facts, is the indictment in this case sufficient to sustain the verdict and the judgment pronounced upon it? While we agree that a *demurrer* to this indictment should have been sustained, had one been interposed, on the ground that it does not substantially conform to the requirements of chapter 1, title 1, of the Criminal Code, yet we do not think that the defects in the same are of such a character that they may be successfully urged on motion in arrest of judgment or upon appeal.

Under the provisions of chapter 8, title 1, of the Code of Criminal Procedure, the defendant had the right, if he had chosen at the proper time and in the proper manner to have demanded it, to have required that the State should specify wherein and for what reason he was charged to have been an illegal voter — whether because he was charged to be a minor, a non-resident of the State, an alien who had not declared his intention to become a citizen, as required by law, or that he was not entitled to vote at the time and place charged, because he had already voted at the same election at some other time and place.

But having slept upon his rights by failing to demand, by demurrer, a fuller specification of the facts and circumstances necessary to the complete identification of the transaction charged against him as a crime, he cannot be heard to object to the indictment after a trial upon the merits, when it substantially charges a crime in the language of the statute.

By his silence and acquiescence, the defendant virtually says: "I understand the nature and cause of the accusation against me, and am ready to meet it upon the issues of fact raised by my plea of not guilty." If the defendant had not so understood the accusation, it was his right and duty to have said so by demurrer, without putting the court and its officer, and the county, to the unnecessary labor and expense of a trial, by the result of which he had resolved, in advance, not to abide, if the issue should be found against him.

This reasoning, of course, does not apply to an indictment which is subject to the objections raised by the first and fourth grounds of demurrer, as specified by statute. Crim. Code, §§ 123, 131.

Counsel for appellant in this case, in support of their position that the indictment is fatally defective in not specifying the grounds of the disqualification of defendant as a voter at East Portland precinct, cite, with much reliance, the case of *Quinn v. The State*, 9 Am. Rep. 754, in which the Supreme Court of the State of Indiana held that an indictment

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for illegal voting very similar to this was insufficient, because it did not sufficiently inform the defendant of the precise nature of the offense charged, so as to enable him to prepare for his defense; but in the case referred to, it will be observed that a motion to *quash* the indictment was interposed by the defendant, which, after argument, was overruled by the court below, and exceptions to the ruling duly taken. In the case in hand, if the indictment had been demurred to, and the demurrer had been overruled, we should hold the same as was held by the Supreme Court of Indiana in *Quinn v. The State*; but the cases do not stand alike — the motion to quash under the Indiana practice being equivalent to the demurrer under ours.

To hold that every minor defect in an indictment may, for the first time, be taken advantage of after trial upon the merits, would do violence not only to the spirit, but to the letter of our Code of Criminal Practice, and would result in entailing upon the public unnecessary expense, and in many instances in thwarting the ends of justice.

We hold, then, that the indictment in this case, although defective in the respects hereinbefore mentioned, does charge a crime, and that its defects, not having been objected to by demurrer, are cured after verdict. This view of the case, as to the sufficiency of the indictment, disposes of the second and third objections against the appellant, involving the questions of irrelevancy of the testimony and the alleged variance between the proofs and the allegations of the indictment.

Judgment affirmed.

MUSGROVE v. BONSER.

(5 Or. 818.)

Deed — registry — notice.

A deed actually recorded, though not entitled to record, is not constructive notice to a subsequent grantee; but if he has in fact seen the record he is affected with actual notice.

SUIT in equity for an injunction. The opinion states the case.

Dolph, Bronaugh, Dolph and Simon, for appellant.

B. Killin and R. Williams, for respondents.

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PRIM, J. This was a suit in equity, brought in the Circuit Court of Multnomah county by Musgrove against respondents, to restrain them from cutting cordwood and removing it from the lands described in the complaint, situate on Oak Island, Multnomah county, Oregon. The appellant and one of the respondents, Ruth M. Bonser, each claim to own the land in controversy by virtue of several deeds of conveyance from the common grantors, M. L. Armstrong and wife. On February 15, 1873, Armstrong and wife executed a deed of conveyance of the land in dispute to Musgrove, which was duly recorded in the county clerk's office of Multnomah county on February 25, 1873, and on December 4, 1860, Armstrong and wife, for a valuable consideration, executed a deed of conveyance for the same land to John Bonser, while in Washington Territory. This deed was placed on the records in the county clerk's office of Multnomah county on December 24, 1860, but without authority of law; because the acknowledgment of the execution thereof had been taken before a notary public of Washington Territory, and because it was deposited for record without first having the certificate of a clerk or other proper certifying officer of a court of record of the county or district within which such acknowledgment had been taken, as required by the statute of Oregon then in force. Statutes 1854, p. 520, § 12.

On January 19, 1866, John Bonser conveyed by deed the land in controversy to Ruth M. Bonser (then Ruth M. Dow) for a valuable consideration, which was duly acknowledged and recorded in the county clerk's office.

As has been stated, the deed of 1860 from Armstrong and wife to John Bonser was acknowledged before a notary public of Washington Territory, where the deed was executed; said acknowledgment being in the following words:

“TERRITORY OF WASHINGTON,

“COUNTY OF CLARK,

“On this 4th day of December, A. D. 1860, before me — — —, a notary public in and for said county, personally appeared M. L. Armstrong and Martha Jane, his wife, * * * to me well known to be the persons named in the within deed, and after the same was read and explained by me to them they each acknowledged to me that — signed and executed the within deed.”

The first point made by counsel for appellant is, that the certificate of acknowledgment appended to the Bonser deed is fatally defective and is

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not evidence of its execution without further proof. It will be noticed that the notary, instead of certifying that Armstrong and wife were known to him to be the makers of the deed, certifies that they were known to him to be the persons named in the written deed, and that "they acknowledged to him that — signed and executed the within deed." The omission of the pronoun *they* before the word "signed," was evidently a clerical mistake; and while the certificate is somewhat defective, yet we think it substantially contains all the requisites of the statute then and there (Washington Territory) in force. We think it may be inferred from this certificate that Armstrong and wife were the makers of the deed; that they were known to the notary personally, and that they acknowledged to him its execution. This deed was not, however, duly recorded in the county of Multnomah, in this State, where the land is situate. The statutes of 1854, p. 520, § 12, require that where a deed is executed outside of this State, unless the acknowledgment is taken before a commissioner appointed by the governor for that purpose, it shall have attached thereto a certificate of the clerk or other proper certifying officer of a court of record, under the seal of his office, that the person taking the acknowledgment was, at the date thereof, such officer as he is therein represented to be, and that the signature of such officer he believes to be genuine, and that the deed is executed and acknowledged according to the laws of said State or Territory.

This deed not having this certificate attached thereto, though copied by the clerk upon the record, was not entitled to be there. It being to all intents and purposes an unrecorded deed at the time appellant took his conveyance from Armstrong and wife, it did not operate as constructive notice to appellant. The only effect of such deed was to carry the legal title as against all persons having actual notice of its existence.

By our statute every deed not recorded, as required by law, is void, as against a subsequent purchaser in good faith, and for a valuable consideration, whose conveyance shall be first recorded. It seems to be well settled, in this country, "both in law and equity, that our recording acts only apply in favor of parties who have acted in good faith," and it is therefore generally held that a conveyance, duly recorded, passes no title whatever, when taken with a knowledge of the existence of a prior unrecorded deed. 2 Lead. Cases in Equity, 183; 9 Johns. 163; 4 Mass. 637.

This brings us to the question made in the pleadings, as to whether appellant purchased the land in controversy with a knowledge of the existence of the prior unrecorded deed of Bonser. This is a question of fact to be determined from the testimony.

On looking into the testimony we find that, prior to taking his deed, Musgrove had procured his attorney to examine the records of Multnomah county, and had been informed by him that there was a deed on record for the same land from Armstrong and wife to John Bonser, executed on January 20, 1860, but that it was not entitled to be on the record. It also appears that, in a conversation with Mrs. Armstrong, he was informed by her that she and her husband had conveyed this land to John Bonser. Notwithstanding he was in possession of all this information prior to taking the deed, he made no inquiry of Bonser and wife as to their rights, though they were his near neighbors. Armstrong and Musgrove were brothers-in-law; John Bonser was the father of Mrs. Armstrong, and all the parties were in the habit of visiting each other. From all the facts developed in this case, we have reached the conclusion that they were sufficient to charge appellant with notice of the prior existing conveyance of respondent, that at least they were sufficient to put him upon inquiry. "It is not necessary, to constitute notice, that it should be in the shape of a distinct and formal communication, and it will be implied in all cases where a party is shown to have such means of informing himself as to justify the conclusion that he might and ought to have availed himself of them." *Barnes v. McClinton*, 3 Penn. 67; *Bohlman v. Coffin*, 4 Or. 313.

The general doctrine is, that whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, and to enable him to ascertain their nature by inquiry, will operate as notice. 2 Lead. Cas. in Eq. 160; 7 Conn. 324; 2 Paige, 202.

Hastings v. Cutter, 4 Foster, 481, was a case where the deed had been registered, although it had not been executed according to the statute, and it was held that while the "registration as such" did not operate as constructive notice of the conveyance, it might operate as actual notice. The court said: "But if by means of that registration of the defective deed the defendants had actual notice of the plaintiff's title, they are charged with the notice as in other cases. The defendants, when they found the copy of the plaintiff's deed on record, must have understood that the intended record was to give information that such a deed had been made, and that the plaintiff claimed the land under it. This must be regarded as actual notice, such as every reasonable and honest man would feel bound to act on."

In order to enable Musgrove to claim precedence as a *bona fide* purchaser it must appear, not only that he had no notice of the prior unrecorded deed of Bonser, when the land was purchased from Armstrong and wife, but also at the time the purchase-money was paid; for if the pur-

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chase-money was paid after such knowledge he could not claim the rights of a *bona fide* purchaser. It is not enough that the deed should express a consideration, but it must be actually paid to enable one to claim the protection of a *bona fide* purchaser. 3 Wash. on Real Prop. 299 ; 6 Mich. 183 ; 12 id. 339.

In this suit it appears from the testimony of Musgrove himself that he never has paid any thing for this land. He testifies that he was to pay for it by giving Armstrong's minor son \$1,000 worth of cattle ; that the cattle were east of the mountains, and were to be counted out and delivered from a large band of cattle at some future time, and that they never have been delivered. Thus it will be seen that the consideration still remains unpaid, unless payment has been made since the testimony was taken.

Another question presented is in relation to the possession of Mrs. Bonser. From the facts set forth in the depositions, we have reached the conclusion that her possession was not of that unequivocal character as that standing alone it would operate to charge Musgrove with full notice, but taken in connection with the facts already referred to in relation to the deed, we think the conclusion we have reached is strengthened and fortified.

If follows from the view above expressed, that the decree should be affirmed.

WHITLEY v. MURPHY.

(3 Or. 328.)

Criminal procedure — appeal abates on death of defendant — effect of death on judgment.

On an indictment for a felony the prisoner was convicted and sentenced to be imprisoned and to pay the costs of prosecution. He appealed, and pending the appeal died. *Held*, (1) that the appeal was abated ; (2) that the judgment for costs remained in force ; and (3) that execution might issue thereon against his estate.

SUIT in equity against the clerk and the sheriff of Marion county and others, to enjoin the collection of costs in the case of *The State v. Whitley, deceased*.

The complaint shows that the said Susan Whitley is the sole executrix of the estate of A. H. Whitley, deceased. That said A. H. Whitley

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died on the 6th day of October, 1873. That on the 17th of October, 1873, appellant was duly appointed sole executrix of the estate, and immediately qualified and entered upon the discharge of her trust, and is still acting as such. That in November, 1872, the said A. H. Whitley was defendant in a criminal action, prosecuted by the State of Oregon, in the county of Polk, against him for an assault with intent to kill, committed against the person of Tilmon Glaze; that afterward the case was transferred to the county of Marion for trial, and was tried at the June term, 1873.

That the trial resulted in the conviction of Whitley of an assault with intent to kill said Glaze; that judgment was rendered upon the conviction that said Whitley be imprisoned in the penitentiary for one year and pay the costs and disbursements of the action.

That an appeal was duly taken by Whitley to the Supreme Court, and the certificate of Judge BONHAM obtained that there was probable cause for said appeal.

That on the 6th day of October, 1873, the said Whitley was shot and killed; that afterward, on the 21st day of January, 1874, the said Supreme Court, without notice to the executrix, and without bringing her into court, or by a suggestion of the death of said Whitley being made of record, and without the substitution of plaintiff as the legal representative of his estate, adjudged "that said appeal do abate;" that this court sent its mandate to that effect to the court below; that the court did not abate the action or make any other judgment in the cause, except to abate the appeal.

That the court did not make any order regarding the costs in the case.

Then follows a general allegation that the costs were illegally taxed, and that an execution was issued on the judgment of conviction against Whitley for the costs and disbursements of the trial, amounting to \$1,870.50, which was levied upon Whitley's property, and closing with a prayer for an injunction against the defendants.

To this complaint, defendants, by their counsel, interposed a demurrer containing fourteen specifications as grounds of demurrer.

The court below sustained the demurrer and dismissed the cause, from which ruling upon said demurrer plaintiff appeals and brings the case into this court.

E. C. Bronaugh, P. C. Sullivan and G. W. Lawson, for appellant.

John Kelsay and J. J. Whitney, District Attorney, for respondents.

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BURNETT, J. In this case, the principal question presented is, whether the appeal in a criminal case vacates the judgment entered in the court below, or simply suspends its operation?

The Criminal Code (page 371, § 237) provides that "an appeal from a judgment on a conviction stays the execution of the judgment, upon filing, with the notice of appeal, a certificate of the judge of the court in which the conviction was had, or of a judge of the Supreme Court, that in his opinion there is probable cause for the appeal, but not otherwise." That is to say, if a defendant in a criminal action can get that kind of a certificate from the judge, he would be relieved from the effects of the judgment against him during the pendency of the appeal, otherwise the judgment would be enforced against him, notwithstanding his appeal; hence the appeal does not even suspend the judgment, much less vacate it; and a prisoner might be incarcerated in the penitentiary under a judgment of the Circuit Court while his appeal from that judgment would be undergoing judicial investigation in this court, and if the judgment under which he was imprisoned should be affirmed, there would be no ground for saying that there were two judgments against him. Taking into view the different provisions of the statute, it would seem very clear that an appeal in a criminal case does not vacate the judgment, nor suspend its operation, except in those cases where the certificate of the judge is obtained of probable cause, and this view appears to be sustained by all of the authorities, except the case in 64 N. C. 599. In the case in 12 Md. 322, cited by appellant's counsel, the court says: "The judgment in a criminal cause cannot be considered as final and conclusive to every intent, notwithstanding the removal of the record to a Superior Court. If this were so, there would be no use in taking the appeal or suing out a writ of error. To be sure, this does not operate to stay the execution of the sentence, if the State chooses to proceed on the judgment; but when decided in favor of the accused, the reversal will operate as far as possible for his relief."

That would be just the result under our statute in cases where no certificate was obtained from the judge, of probable cause, and it does not appear that the Maryland statute had any provision like ours for staying the execution of the judgment during the appeal.

The case in 64 N. C., before referred to, holds that an appeal in a criminal case in that State vacates the judgment appealed from. Whether the statute under which that decision was made is like the statute of this State or not, does not appear, and it is fair to presume that it was different from the Maryland statute and different from ours, or no such decision would have been made.

If, then, the execution of the judgment in this case in the Circuit Court was merely suspended by the appeal, together with the certificate of the judge, whenever that appeal abated it left the judgment in the court below in full force. When the judgment was rendered against Whitley that he be imprisoned in the penitentiary for one year, and pay the costs and disbursements of the action, it devolved upon him to procure a reversal of that judgment if he expected to escape the sentence inflicted by it, or save his property from the payment of the costs and disbursements adjudged against him. That he had taken steps to get it reversed does not signify; his dying as completely satisfied the sentence of the law as if he had lived and served out his time in the penitentiary; but it did not satisfy the judgment for costs and disbursements any more than his serving out his time in the penitentiary would have done.

It is claimed by counsel for appellant that, admitting that the execution of the judgment against Whitley was only suspended by the appeal and certificate of the judge, yet the death of Whitley, preventing the judgment from being carried into effect, so far as it inflicted punishment upon the person of the defendant, the costs and disbursements of the action cannot now be collected from Whitley's property, as they were the mere incidents to the judgment of conviction; or, in other words, that you cannot enforce part of the judgment, without enforcing the whole of it. But this position is not tenable. The statute, in the first place, provides that the State shall have a lien against the property of the defendant for costs and disbursements in cases of a felony, from the time of the commission of the offense. Criminal Code, § 763.

Again, it is provided that a judgment that the defendant pay costs and disbursements shall be docketed as a judgment in a civil action, and enforced in the same manner. Criminal Code, §§ 211, 212.

That portion of the judgment inflicting imprisonment would have to be enforced as provided by section 214 of the Criminal Code, which is by delivering the body of the defendant, together with a copy of the judgment, to the keeper of the prison; thus showing that the judgment is carried into effect by two separate and independent kinds of process, and the failure to enforce one part of the judgment no more invalidates the other than the enforcement of one part satisfies the other. Suppose that Whitley, instead of taking an appeal, had left the country, it would hardly be contended that his property would not be liable for the costs and disbursements of the criminal action, independent of the liability of his bondsman. Or, suppose that he had served out his time in the penitentiary under the sentence inflicted by the judgment; that would satisfy

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that part of the judgment, but it would still stand as to the costs and disbursements, and be a lien on all of his property.

It is claimed by appellant's counsel that the execution was not issued in pursuance of subdivision 2 of section 273 of the Code; but in looking into the complaint it appears that no issue is tendered upon that point, and as there is no copy of the execution annexed to the complaint we are bound to presume that it was issued in accordance with the law. Civil Code, § 766, subd. 15.

It is further claimed by the appellant, that the amount of costs and disbursements taxed against the defendant in the case of *The State of Oregon v. Whitley* is incorrect and a part of it should not be paid, and that if Whitley's property is liable still, his representatives are entitled to contest the correctness of the amount taxed. It is no doubt correct that if these costs and disbursements are illegally and fraudulently taxed, the appellant has a right to have that taxation corrected.

The only provisions of the statute relating to the taxation of costs in criminal cases are found on page 815, section 1043 of the Civil Code, and page 606, sections 20 and 21 of the General Laws. There is no provision for an appeal from the clerk's taxation of costs and disbursements in criminal cases, and the only relief a party would have would be under the former practice, to apply to the court by a motion to correct the taxation made by the clerk. Admitting that a party might have a remedy in that way, he is not bound to take that course, and if Whitley was now living and an execution had been levied upon his property to pay these costs and disbursements, he would have a right to come into court and show that a fraud had been practiced on him in the taxation of the costs. But the allegations of the fraud in this kind of a case must be the same that they would be in any other. Where a court of equity is called on to interfere in case of fraud, a bill for relief on the ground of fraud must be specific in stating the facts which constitute the fraud; it is not sufficient to charge fraud in general terms. *Kent v. Snyder*, 30 Cal. 666; *Castle v. Bader*, 23 id. 75; *Moore v. Green*, 29 How. Pr. 69.

In this case the allegations in the bill are too general. There are no specific facts alleged upon which issue could be taken and evidence introduced to show in what respect the taxation of the costs and disbursements was illegal and fraudulent.

Judgment affirmed and complaint dismissed without prejudice.

STATE v. CHURCH.

(5 Or. 375.)

Election — bribery — offering to give salary to county — pleading.

In an action in the nature of *quo warranto* to declare void the election of a county officer on the ground that he offered, before election, to pay a part of his salary into the county treasury if he should be chosen, *held*, that the complaint was bad for not showing that voters influenced by such offer were tax payers of the county or would otherwise be benefited by the performance of the promise.

ACTION under section 354 of the Civil Code, for the purpose of having the respondent adjudged ineligible to hold the office of county judge of Grant county, and to have him ousted therefrom.

It is alleged in the complaint, in substance, that at the June election, 1874, the relator, the respondent, and Eli Lester were candidates for county judge of Grant county; that the respondent received two hundred and seventy-six votes; the relator, two hundred and seventeen; and Lester, one hundred and six; that at such election the respondent induced seventy voters to vote for him, upon the promise that, if he was elected to the office of county judge, he would pay two hundred dollars per annum out of his salary (eight hundred dollars), into the county treasury of Grant county; that the respondent received a certificate of election, and thereafter usurped the office, etc.

The respondent demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment rendered in favor of respondent for his costs, from which judgment this appeal is taken.

B. Whitten, for appellant.

M. Dustin, in person, for respondent.

BONHAM, C. J. Section 354 of the Civil Code, under which this proceeding was instituted, declares that "an action at law may be maintained in the name of the State, upon the information of the prosecuting attorney, or upon the relation of a private party, against the person offending, in the following cases:

"1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation, either public or private, created or formed by or under the authority of this State."

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It is not claimed in this case that the respondent either bribed or offered to bribe, or reward directly, any one of the seventy voters named in the complaint; but it is claimed that a promise to reward a third person, whether it be a natural or artificial person, would be within the spirit of the law, and would embrace the mischief which it is intended to obviate.

Our Criminal Code (§ 627) makes it a felony to pay or promise to pay any valuable consideration, or thing whatever, to influence a voter to vote for or against a particular person, at any legally authorized election in this State, and denounces the act as bribing or offering to bribe a voter.

Section 7 of article 2 of our State Constitution declares that "every person shall be disqualified from holding office, during the term for which he may have been elected, who shall have given or offered a bribe, threat, or reward to procure his election."

It is claimed by respondent that the complaint, in any view of the case, fails to show that respondent comes either within the purview of section 627 of the Criminal Code, or section 7 of article 2 of our State Constitution, hereinbefore referred to, for the reason that it does not appear from the complaint that any one of the seventy voters therein referred to and named, was a tax payer in Grant county.

It is not charged that the respondent has actually paid into the treasury of Grant county any part of his salary as county judge, under the promise made to the seventy voters referred to, but it is only charged that he promised to do so, in order to secure their votes.

What is meant by the term "reward," as used in the Constitution, and in section 627 of the laws referred to? Burrill defines a reward to mean "compensation or remuneration for services; a sum of money paid or taken for doing or forbearing to do some act."

The payment of stipulated sums of money into the county treasury of Grant county, by the respondent, would inure to the benefit of the resident property-holders and tax payers of that county, by reducing *pro tanto* the rates necessary to be levied by the county authorities to maintain its corporate government and other expenses incidental thereto. But unless it appears from the complaint that the seventy voters, or some of them, at least, were tax payers, we hardly think it could be claimed that they would have been compensated, or remunerated, for casting their votes for respondent, if he had performed his agreement to pay two hundred dollars per annum of his salary into the county treasury. If the promise *executed* would not have operated as a reward, the same promise *unexecuted* would not operate as a promise to reward.

It might be very plausibly argued, it is true, that, as a matter of fact, probably some of the seventy voters named in the complaint of the relator were at the time tax payers in Grant county, and, for that reason, would have been at least indirectly benefited by the payment of money into the county treasury. But that will not do. In the construction of pleadings, under a statute or constitutional provision, penal in its character, there is no authority for indulging in presumptions or probabilities of this nature.

It was also urged, upon the argument of this cause by respondent, that the charge made against him in the complaint that he had promised the seventy voters of Grant county therein named, to pay two hundred dollars per annum of his salary as county judge into the county treasury in case of his election, would not, in any event, be a promise "to reward a voter" within the meaning of section 7, article 2, of our Constitution, or within the meaning of section 627 of the Criminal Code. In answer to this, counsel for appellant cites the case of *The State of Wisconsin ex rel. Newell v. Purdy*, 36 Wis. 218; S. C., 17 Am. Rep. 485.

In order to constitute the rewarding or the bribing of a voter by a candidate for office, we do not think it essential that the candidate should pay the price agreed upon for such vote directly into the hands of the voter in question; but the same results would follow the payment of the purchase-price to a third person, or to an association or community of persons, if so made by the direction of the voter, and for his use and benefit. A payment, under such circumstances, would be made to the agent of the voter, and in contemplation of law would be a payment to him.

It is doubtless true, in some instances, in cases like this, that an offer made by a candidate to discharge the duties of the office which he seeks for less than the salary fixed by law, is made in good faith and for the purpose of promoting retrenchment and reform in the administration of public affairs. Such may have been the motives which actuated the respondent in this case; but of that we cannot speak, because the merits of the case are not before us in that respect. Yet we are clearly of the opinion that the general tendency of the practice, by candidates for office, in offering, directly or indirectly, any pecuniary consideration whatsoever to secure the votes of electors, is demoralizing in its effects, and contravenes well-established principles of public policy; although the act may, in many cases, fall short of bribery under the criminal law. And, in this connection, we desire to quote from and give full sanction to the earnest and logical opinion of Mr. Justice LYON, in the case of *The State of Wisconsin v. Purdy*, above cited.

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In this case, Newell, the relator, published a card, addressed to the voters of Vernon county, offering himself as a candidate for the office of county judge of said county, and pledging himself, if elected, to discharge the duties of the office for seven hundred dollars, the lawful salary being one thousand dollars per annum. The defendant Purdy, who was at the time the acting incumbent of the office in question, refused to surrender the office to Newell, for the reason, as alleged in his answer, that one hundred of the voters and tax payers of said Vernon county, who had intended to vote for him (Purdy) for said office of county judge, were, by the corrupt and unlawful promise of Newell, induced to change their minds and to cast their votes for said Newell for said office. In deciding the case, Mr. Justice LYON said :

“It was argued by the learned attorney-general, that the proposition made by the relator to the voters of Vernon county, was merely a protest against high salaries ; and, being in the direction of reform and economy in public expenditures, should rather be commended than censured.

“Promises, made to the people by candidates for public office, that, if elected, they will practice a rigid economy in the expenditures of their several departments, are unobjectionable ; and, if the successful candidate fulfills his pledge in that behalf, he is entitled to commendation. In such case, the candidate only promises to perform a legal and a moral duty. For example, should a candidate for governor promise that, if elected, he would discharge all persons employed by the State whose services are not needed, or, that he would prevent all unnecessary expenditure of public funds, so far as he may have power to do so, this is only a promise that, if elected, he will, in those respects, faithfully perform the duties of his office. In other words, it is a promise that he will not violate his official oath. But, should such candidate propose to the voters and tax payers of the State, that, if they will elect him to the office of governor, he will serve the State therein gratuitously, or for one-half the salary allowed by the Constitution, and pay the rent of an executive office, and the expenses of fuel, stationery, and other incidentals pertaining thereto, out of his own pocket, his proposition has an entirely different aspect. In the one case, the candidate promises that, if he is elected, he will regard his official oath, and faithfully and honestly discharge his official duty ; while, in the other case, he proposes to buy the office with promises to pay therefor in personal services, or money, or both. The one tends to economy and true reform, but the tendency of the other is to introduce into elections a most mischievous element, very

nearly allied to bribery—an element which never has been tolerated (and never can be, with safety) by any free government. But, we are told that propositions similar to that of the relator are very frequently made by candidates for public offices. We have seen no case in the books, and none is within the recollection of any member of this court, before the present case was brought to our notice, where a candidate for an important judicial office has offered to donate money or official services to the public, as a consideration for his election. We must be permitted, therefore, to doubt whether such transactions are of frequent occurrence. On the contrary, we think they are not sustained by an enlightened public sentiment, and that they occur very rarely. If the course pursued by the relator should receive judicial sanction, it is more than probable that all those public offices which are deemed desirable would, in time, become the objects of pecuniary bids, or offers; and, in many cases, would be bestowed upon the highest bidders, without much regard to their fitness for the positions thus purchased by them. At least, such would be the inevitable tendency. The evils of such a condition are of very grave import, and we are warned by the wisdom and experience of centuries to avoid them.

“When our elections to fill public offices cease to express the free, intelligent, and unbiased judgment and choice of the electors, when they shall be controlled or materially influenced by pecuniary offers made by the candidates, whether to the electors or to the municipality (which is but the aggregation of the electors), a most vital condition of free government will be disregarded. The tendency might be, in such cases, to banish from the public service all who will not pay for the privilege of being employed therein, and to fill it with less scrupulous, and, therefore, less trustworthy and less deserving men. Elections by the people might thus cease to express the free and unbiased judgment and will of the people, but might be controlled by mercenary considerations, either public or private, or both, and would thus speedily and justly fall into public contempt.

“So far as we are advised, no judicial tribunal has given any countenance whatever to any practice or act which tends in that direction, but the courts have steadily held that popular elections must be kept free from any taint of corruption, and from all improper or unlawful influences whatever. * * * We would not hold that a man may buy a public office, especially a most important and responsible judicial office, just as he would buy a horse at auction; that is, by offering to pay more for it than any other person is willing to pay. We can never give the sanction of this court to a doctrine so pernicious.”

State v. Church.

The views of the Supreme Court of the State of Wisconsin are so forcibly and pointedly expressed on the subject under review in this case, that we could not refrain from quoting thus extensively from the opinion of the court as there rendered.

It was furthermore claimed by respondent in this case, that if the complaint herein should be held sufficient to require him to answer thereto, it would then charge him with the crime of attempting to bribe a voter, as defined by section 627 of the Criminal Code, and that judgment of conviction upon a trial by indictment must precede a trial and judgment of ouster under the proceedings instituted by the relator in this case. Upon this point we do not deem it necessary to pass for the purposes of this case, inasmuch as we hold that the complaint is defective in not showing that any of the seventy voters named were tax payers in Grant county; or that they, or any of them, would be beneficially interested by the payment into the county treasury of the two hundred dollars per annum, which respondent is charged by the relator with having promised said seventy voters so to pay, as an inducement to them to vote for him for the office of county judge.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
OHIO.

JONES v. GREAVES.

(26 Ohio St. 2.)

Evidence — amount of, in civil action involving a crime.

On the trial of a civil action wherein the claim or defense is based on an alleged fraud, the issue may be determined in accordance with the preponderance or weight of evidence, whether the facts constituting the alleged fraud do, or do not, amount to an indictable offense.*

MOTION for leave to file a petition in error to the District Court of Muskingum county.

The original action was brought by William Greaves against Jones, Stranathan & Co., to recover a balance alleged to be due to the plaintiff for labor and materials in tin-roofing a store-house of defendants under a special contract. The contract, as the plaintiff claimed, designated the material to be used as "the best quality of roofing-tin;" but the defendants claimed that the contract required "ix charcoal tin" to be used. The latter is the better quality of tin, and worth four dollars per box more than the former. The contract was entered in this way: The defendants proposed for bids in writing, specifying the quality of the material to be furnished for the roof by the bidder; the plaintiff's bid was \$1,100, which bid the defendants accepted and promised to pay. Afterward, the plaintiff purchased tin of the quality known as "the best quality of roofing tin;" whereupon the defendants objected to the use of

* See *Kane v. Hibernia Ins. Co.*, *ante*, p. 409 and note.

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this quality of tin, unless the plaintiff would agree to abate from the contract price four dollars per box of tin. The plaintiff agreed to the reduction and used the material so purchased in making the roof. Afterward, the plaintiff refused to accept in payment less than the original contract price, on the ground that his agreement to abate the four dollars per box was obtained by the fraudulent acts and representations of the defendants. The fraud practiced by the defendants, as claimed by the plaintiff, was thus: That after the making of the original contract, the defendants fraudulently altered the written proposal for bids, by inserting the words "ix charcoal tin," and afterward induced the plaintiff to believe that the specification of materials, at the time plaintiff's bid was made, required the furnishing of the better and higher priced quality of tin.

This question of fraud was put in issue by the pleadings, and testimony was offered, on the trial, tending to prove the issue on both sides.

The Court of Common Pleas was requested by the defendants to charge the jury that before they could find the defendants guilty of the fraud alleged, they must be satisfied from the evidence, beyond a reasonable doubt, that the fraud had been committed. This request the court refused to give, but did charge that a preponderance of evidence would be sufficient to prove the same. Exceptions were taken. Verdict and judgment were rendered for the plaintiff. On error, the District Court affirmed the judgment below; and the only matters assigned for error here relate to the refusal of the Common Pleas to charge as requested and to the charge as given.

Evans & Beard, for the motion.

M. M. Granger, with whom was *D. B. Gary*, contra.

MCLIVAIN, C. J. There is no doctrine of the law settled more firmly than the rule which authorizes issues of fact in civil cases to be determined in accordance with the preponderance or weight of the evidence. The reason of the rule no doubt is, that as between man and man, where a loss must fall upon one or the other, it is right that the law should cast it upon him who is shown to have been the cause of the loss, by proof establishing the reasonable probability of the fact.

But in criminal cases, where compensation for the injury done is not an element, the rule may well be, and is, different. In these cases, where the sole object of the prosecution is *punishment*, a humane principle is introduced, which requires that the guilt of the accused should be proved beyond a reasonable doubt. This principle is often expressed in

the maxim, "It is better that ninety and nine guilty persons should go acquit, than that one innocent person should be punished."

It is claimed, however, by the plaintiffs in error (defendants below), that civil actions, wherein fraud amounting to a criminal offense is directly in issue, are excepted from the rule above stated; and that in such cases the rule of the criminal law applies. And they further claim, that the facts in issue in the case below, constituting the fraud alleged against them, amounted to the crime of forgery. Whether forgery could have been committed by altering the paper referred to in the pleadings, or whether the alteration alleged to have been made by the defendants below amounted to the crime of forgery, are questions we need not stop to answer, as we are satisfied, in any event, that the issue of fraud, as made in this case, did not take it out of the operation of the general rule applicable to the trial of civil issues. If there be any exception to the rule, of the kind claimed, it is limited to cases where it is necessary in order to maintain the issue made, to prove that a crime was in fact committed; as, for instance, in justification of a slander imputing a crime.

We have no occasion now to question the existence of such limited exception, but I may be permitted to say that all argument and all authority are not in its favor. It was denied, with great reason, in *Munson v. Atwood*, 30 Conn. 102—an action, under a statute, to recover treble damages for property *feloniously* taken and carried away.

We are aware that an exception to the rule, broader than we have stated it above, has been recognized in a few *insurance cases*. 16 Ohio, 324; 2 Greenl. Ev., § 408. It has been held, however, to the contrary, in other well-considered cases. 1 Gray, 529; 1 La. Ann. 216.

What the rule may be in *insurance cases* we need not now determine, further than to say that if there be no ground of distinction between them and other civil cases, it is extremely doubtful whether, as to them, there is any exception to the general rule; as it is quite certain that an insurer may successfully defend, in an action on his policy, on the ground of gross or willful misconduct on the part of the insured, which does not amount to criminal conduct.

We think it is going to the verge of the law, to hold that an issue of fact, in a civil case, must be proved beyond a reasonable doubt, even where a charge of crime is directly made, and where, also, it is necessary that it be made in order to sustain the claim or the defense; as it is difficult to see how a person, who wrongs another without criminal intent, and is liable in damages on a mere preponderance of the evidence, can shelter himself from liability, behind a reasonable doubt, by merely

adding to the wrongful act a criminal purpose. Of course, we are not now speaking of those enormous crimes, where all personal injury is merged in the public wrong; nor do we intimate that in all civil actions the issues should be determined by a mere preponderance of the *testimony offered on the trial*, however slight. Where the facts charged involve moral turpitude, there is a presumption of innocence which stands as evidence in favor of the party charged: and the more heinous the offense, the stronger the presumption. It is only where the testimony, when considered in connection with the presumptions of law arising in the case, preponderates in favor of the charge that its truth should be found; but when so considered, by discreet and reasonable triers, the issue should be determined in accordance with the preponderance, although it may not be said that the proof has removed all reasonable doubts.

The conclusion, therefore, to which we have come is this: that whatever may be the rule in civil cases, where the claim or defense can be established only by averment and proof that a crime has in fact been committed, in all other civil cases the issue should be determined by the weight or preponderance of the evidence, whether it be or be not sufficient to remove all reasonable doubts.

How then stands this case? It was not necessary, in order to maintain the issue on this part, that the plaintiff below should have proved, nor was it necessary for him to aver in his pleadings, that the alteration in the written proposal for bids was a forgery within the meaning of the crimes act. Indeed, the consequences of the alteration were the same to him and to his case, whether there was or was not such a crime as forgery known to the criminal law. It was only material for him to show that the altered paper was fraudulently used by the defendants as a means to obtain from him a change in the contract. Whether the alteration had been innocently or feloniously made was of no direct importance. The material question in issue was this: Did the defendants fraudulently obtain from the plaintiff the modification of the contract as subsequently agreed to by him.

This case comes within the principle decided in the case of *Strader v. Mulvane et al.*, 17 Ohio St. 624. There was no error in the refusal to charge, or the charge as given by the Court of Common Pleas.

Motion overruled.

WELCH, WHITE, REX and GILMORE, JJ., concurred.

CRAMER v. LEPPER.

(26 Ohio St.39.)

Usury — who may set up defense of. Interest on interest.

Where one purchases land subject to a mortgage lien, and, as part of the consideration, agrees to pay the mortgage debt, he cannot defend against the mortgage on the ground of usury. (*See note, p. 756.*)

Under a contract for the payment of interest at a specified rate annually, upon default of payment, interest on the interest will be computed at six per cent.

MOTION for leave to file a petition in error to the District Court of Summit county.

On the 25th day of February, 1868, Philip Cramer executed his note to Samuel C. Taylor for \$2,500, payable five years after date, with interest at the rate of ten per cent per annum, payable annually; and, to secure payment of the note, executed a mortgage on certain real estate situate in Summit county.

Afterward, on the 2d day of February, 1869, Cramer, by contract in writing, sold the mortgaged premises to Peter Lepper, and agreed to convey the same in fee-simple on or before the 2d day of April, 1869; and, in consideration thereof, Lepper agreed to pay \$23,850, as follows: By the conveyance of a certain other tract of land to Cramer, \$9,000; by the transfer of certain notes, \$9,200; by his own notes bearing interest, \$3,150; and the balance of the purchase-money was provided for in these words: "There is a lien on said Cramer's farm of twenty-five hundred dollars, held by a Mr. Taylor, which Peter Lepper agrees to pay."

On the 1st of April, 1869, Cramer executed and delivered to Lepper a deed in pursuance of the contract, in which the grantor covenanted that the premises were free and clear of all incumbrances, "except a mortgage claim of a Mr. Taylor for \$2,500, which Peter Lepper is to pay to said Taylor."

From time to time between the delivery of the deed and the 12th of March, 1874, Lepper paid to Taylor on his mortgage divers sums, amounting to \$2,675.73.

On the 25th of April, 1874, Taylor brought his action in the Court of Common Pleas of Summit county, against Cramer and Lepper, to enforce his mortgage lien for the balance due on the note, including interest at the rate therein specified.

On the final hearing, at the May term, 1874, Cramer admitted the

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right of the plaintiff to recover according to the prayer of his petition, but Lepper resisted so much of the claim as was usurious. Thereupon, the court found the balance due on the mortgage in favor of the plaintiff, computing interest at the rate of ten per cent, payable annually, to be \$1,402.50; and decreed, upon failure of payment at a short day, the sale of the mortgaged premises.

Thereupon, the court proceeded to determine the rights of the defendants as between themselves, proper pleadings having been interposed for that purpose, in which Cramer claimed that Lepper was bound by the contract to pay the whole amount of the decree. Lepper, on the other hand, claimed that, under the contract, he was bound to pay any balance that might be unpaid of the sum of \$2,500, and interest thereon from the 1st of April, 1869, at the rate of six per centum per annum and no more.

Upon this issue there was introduced in evidence the contract of February 2, 1869, and the deed of April 1, 1869, above named, together with an agreed statement that Taylor's mortgage had been duly recorded, and that Lepper, at the date of the contract, had knowledge of the contents of the note and mortgage.

Thereupon, the court decreed that, as between themselves, Cramer was bound to pay of the balance due to Taylor on his decree, the sum of \$275.20, and Lepper the balance—to wit, \$1,126.80.

On petition in error to the District Court by Lepper, it was alleged that the Common Pleas erred: 1. In holding that Lepper was bound by his contract to pay to Taylor a greater sum than \$2,500, and interest thereon at the rate of six per cent from and after April 1, 1869; 2. In not holding that Cramer was liable for interest on said sum of \$275.20 from and after the 1st of April, 1869:

The judgment of the Court of Common Pleas was reversed by the District Court, and this proceeding is to obtain a reversal of the judgment of the District Court.

H. W. Ingersoll, for the motion.

Edgerton, Kohler & Campbell, contra.

BY THE COURT: As between Taylor, the mortgagee, and Lepper, the grantee of the mortgagor, the latter must be regarded as the purchaser of the equity of redemption merely; and, as such, he had no right to set up by way of defense that the note secured by the mortgage was usurious. The defense of usury in such case is personal to the mortgagor, and if waived by him, cannot be set up by his grantee, who

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assumes, in consideration of the grant, to pay the claim of the mortgagee. *Union Bank v. Bell*, 14 Ohio St. 201; *Green v. Kemp*, 18 Mass. 515; *Shufelt v. Shufelt*, 9 Paige, 187; *Morris v. Floyd*, 5 Barb. 180.

As between Cramer and Lepper, the vendor and purchaser of the equity of redemption, we think the Court of Common Pleas rightly construed their contract in holding Cramer to the payment of the interest which had accrued on the note and mortgage prior to April 1, 1869, the date of the conveyance. This construction is sustained in view of the fact that the amount of the mortgage debt assumed by Lepper is stated in the contract at \$2,500, the principal of the note only; and especially as the principal debt, excluding interest fully and exactly, when added to other specific sums agreed to be paid, amounts to the sum agreed as the price to be paid for the mortgaged premises.

And as between the same parties, it is clearly shown by the terms of their contract when considered in the light of the known facts, that Lepper's undertaking was to pay the principal of the note, with interest, after the date of the conveyance, at the rate therein specified, as part consideration for his purchase.

But we think the Court of Common Pleas erred in not charging Cramer with the interest which accrued on the sum decreed against him from April 1, 1869, until the date of the decree. The sum, as we understand, was the interest which had accrued on the note before the date of the conveyance, and, as against Cramer, Lepper should have been released from interest accruing thereon. The rate of such accruing interest was six per cent, there being no agreement as to the rate of interest upon accrued interest. This being the rate to which Taylor was entitled, the same rate must be computed as between Cramer and Lepper.

For this error the judgment of the Court of Common Pleas was rightly reversed, and hence this motion must be overruled.

NOTE.—That the purchaser of premises subject to a mortgage cannot set up the defense of usury was also held in *Hough v. Horsey*, 11 Am. Rep. 484; S. C., 36 Md. 181.

In New York it is held that the purchaser of land incumbered by a usurious mortgage may set up the defense of usury in defense to a bill of foreclosure. *Brooks v. Avery*, 4 N. Y. 225; *Lynde v. Staats*, 1 N. Y. Leg. Obs. 89; *Cole v. Savage*, 10 Paige, 583; *Shufelt v. Shufelt*, 9 id. 137; *Berdan v. Sedgwick*, 40 Barb. 359, and cases cited by ALLEN, J. Affirmed, 44 N. Y. 626. But it is also held in the same State that the purchaser of a mere equity of redemption, as where one purchases land subject to a mortgage and the amount of the mortgage debt is deducted from the price — the purchaser agreeing to pay the mortgage — cannot interpose the defense of usury. *Ferris v. Cranford*, 2 Denio, 595; *Hartley v. Harrison*, 24 N. Y. 171; *Mason v. Lord*, 40 id. 476; *Post v. Dart*, 8 Paige, 639; *Hardin v. Hyde*, 40 Barb. 435; *Freeman v. Ault*, 44 N. Y.

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50. See Thomas on Mortgages, 211. See also 13 Alb. Law Journal, pp. 39 and 71, where the subject of who may set up usury as a defense or obtain relief in law or in equity against it is very fully discussed.

In the following cases it is also held that the purchaser of a mere equity of redemption of premises covered by a usurious mortgage, who purchases subject to the mortgage, cannot set up the defense of usury. *Conover v. Hobart*, 24 N. J. Eq. 120; *Bridge v. Hubbard*, 15 Mass. 103; *Reading v. Weston*, 7 Conn. 413; *Stephen v. Mutz*, 8 Ind. 382. But see, otherwise, *Gunnison v. Gregg*, 20 N. H. 100, and *McAllister v. Jemman*, 32 Miss. 142.—REF.

HIGLEY v. THE FIRST NATIONAL BANK OF BEVERLY.

National Bank—usury.

(26 Ohio St. 75.)

The knowingly taking or receiving by a national bank of a rate of interest greater than is allowed by law upon a loan of money does not entitle the person paying the same to have it applied as a payment of so much of the principal, in an action brought to recover the principal debt more than two years after such payment was made. The rights and liabilities of the parties in such case are prescribed in the national bank act, and cannot be controlled by State legislation.

MOTION for leave to file a petition in error to the District Court of Washington county.

This action was brought in the Washington County Common Pleas by the First National Bank of Beverly, Ohio (a corporation organized under the act of Congress, passed June 3, 1864), against B. S. Higley and others, on two promissory notes, each dated June 18, 1874 (one for \$3,000, the other for \$102.50), and both payable at said bank, to the order of its cashier, ninety days after date. The petition demanded judgment for \$3,102.50, with interest thereon from September 19, 1874.

The answer was in two counts, both of which set out that the notes sued on were made in renewal of a series of other notes given for a loan of \$3,000 from said bank, July 5, 1871. The first count also alleges the payment of usurious interest on said loan, which was knowingly taken and received by said bank, as follows: July 5, 1871, \$77.50; October 6, 1871, \$77.50; January 6, 1872, \$77.50; April 8, 1872, \$77.50; July 10, 1872, \$77.50; total, \$387.50.

The second count also sets out the payment of usurious interest on

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said loan, knowingly taken and received by said bank, in addition to the sums mentioned in the first count, as follows: October 11, 1872, \$77.50; January 12, 1873, \$77.50; April 12, 1873, \$77.50; July 14, 1873, \$77.50; October 15, 1873, \$77.50; January 16, 1874, \$40; April 1, 1874, \$60.50; June 18, 1874, \$102.50; total, \$592.50.

In the Common Pleas, the bank interposed a general demurrer to the first count of the answer, which was sustained. To the second count the bank replied, alleging that the payment of \$77.50, October 11, 1872, was made "more than two years" before the filing of the answer, which was October 24, 1874. There was a general demurrer to this reply, which was overruled. Thereupon judgment was entered against the defendants, in favor of the bank, for the whole amount claimed in the petition (except interest), less \$1,030,—a penalty in twice the amount of the usurious interest paid *within* two years before filing the answer; to which judgment, as well as to the action of the court upon the two demurrers, the defendants below excepted, and afterward, at the April term thereof, 1875, prosecuted their petition in error in the District Court, which resulted in an affirmance of the judgment below.

This action is prosecuted to reverse the judgment rendered in the District Court, and also the original judgment of the Common Pleas.

Ewart & Sibley, and Higley, for the motion.

S. B. Robinson, contra.

MOLLVAINE, C. J. The main question in this case is thus stated by counsel for plaintiff in error: "Does the knowingly taking and receiving a rate of interest greater than is lawful, by a national bank, on a loan made, or note discounted by it in this State, entitle the party paying the illegal interest to have it applied as a payment of so much of the principal debt, in an action brought more than two years after the payment was made, to recover the principal sum?"

This question, we think, must be answered in the negative.

By section 8 of the national bank act, there is conferred upon national banks general powers necessary to carry on the business of banking, "by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt," etc. By section 30, the rate of interest which such banks may lawfully take, receive, reserve, and charge is limited; and it is also therein declared that "the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the

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note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same; provided that such action is commenced within two years from the time the usurious transaction occurred." Laws 1st Sess. 38th Cong. 114, § 30.

Without stopping to inquire how a bank may be affected in its relations to the government by reason of usurious transactions, it is quite certain that a customer who participates in the offense by paying or agreeing to pay a usurious rate of interest to such bank, is entitled to no relief or remedy except as provided in this section.

By the first provision in that part of the section above quoted, if the contract or promise to pay usurious interest be unexecuted, it cannot be enforced; and in such case the debtor is released from the payment, not only of the interest in excess of the lawful rate, but "the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon," must be held and adjudged to be forfeited. By the latter provision, if usurious interest "has been paid," twice the amount of interest paid may be recovered back from the association "taking or receiving" it, provided the action therefor be commenced within two years from the time the usurious transaction occurred. And by construing the whole section together, we are inclined to believe that in case usurious interest has been "reserved" at the time of the loan or discount, there is left to the bank a *locus penitentiae*. In such case the bank may, upon receiving payment of the debt, discharge itself from all liability to the debtor by giving credit for the amount of interest reserved; otherwise, the debtor may insist upon a reduction of his indebtedness to the amount actually loaned or advanced, or he may pay the whole claim, and afterward, within two years, recover back twice the amount of interest paid.

On this construction of section 30, it is clear that defendants below had no right, by virtue of the national bank act, to recoup from plaintiff's claim any sum whatever on account of usurious interest paid to the bank more than two years next preceding the time of filing their answer in the action below.

Whether the rebatement made from the plaintiff's claim of twice the amount of usurious interest paid thereon within two years next preceding was properly allowed is a question not now before us.

It is also contended that, under the statute law of this State, if not

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the entire interest, at least the excess above the rate allowed by law, paid by the defendants below, should have been held as payments made on account of the principal.

Conceding that national banks are in many respects subject to the laws of the States where situate, and especially to their remedial laws, it is a good answer to the above claim to say that, in relation to usury and the rights and liabilities of the parties participating in the offense, Congress has assumed to make provision, and the provision so made must be regarded as exclusive. In this respect, the act of Congress prescribes the only rule, and over it the legislative power of the State has no control.

The point is also made that a person entitled to recover back twice the amount of usurious interest paid is entitled to interest thereon from the date of payment until the time of recovery. On this point also we differ with counsel. The amount thus recoverable is in the nature of a penalty, and the statute must be strictly construed. Interest on such claim, before judgment, not being expressly given by the statute, cannot be allowed.

Motion overruled.

WELCH, WHITE, REX and GILMORE, JJ., concurred.

GAYLORD V. IMHOFF.

(26 Ohio St. 317.)

Partnership — exemption from execution.

The members of an insolvent firm are not entitled to the statutory exemptions out of the partnership property after it has been seized in execution by partnership creditors, notwithstanding all the members join in demanding the exemptions.*

ERROR to the Superior Court of Cincinnati.

The plaintiffs in error were plaintiffs in the Superior Court of Cincinnati, where they obtained judgment against the defendants, Michael Imhoff, Henry Steinegerwag, and George Pfluger, partners, doing business as M. Imhoff & Co. Execution was issued and levied upon a leasehold and machinery belonging to the defendants as copartners. The

* See *Russell v. Lennon*, *ante*, p. 60.

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defendants severally demanded the statutory exemptions out of the property; but the sheriff, disregarding the demands, sold the property and brought the proceeds into court.

The defendants then moved the court to give each of them the sum of \$500 out of the money arising from the sale of the property in lieu of the property itself.

On the hearing of the motion it was agreed between the parties as follows: "That all the property levied on and sold was partnership property, including the leasehold, and that the affidavit and demand of exemption by the defendants were filed with the sheriff before the sale, setting forth that they were heads of families, residents of the State, and not the owners of homesteads or any other property." The motion of the defendants was allowed, and the court ordered the sheriff to pay to each of them, out of the proceeds of the sale in his hands, the sum of \$500, in all, \$1,500; and if the proceeds should be insufficient, then to pay to each of the partners one-third of the sum remaining in his hands after the payment of costs.

The plaintiff excepted to the allowance of the motion and the order of the court thereon, and the rulings of the court in these respects are assigned for error here.

James R. Challen, for plaintiffs in error.

Matthews, Ramsey & Matthews, for defendants in error.

GILMORE, J. The only question that will be considered in this cause is this: Where all the members of an insolvent firm join in the demand, are they entitled to the statutory exemptions out of partnership property after it has been seized in execution by partnership creditors? We think not. The section of the statute under which the question arises is as follows: "Sec. 3. That it shall be lawful for any resident of Ohio, being the head of a family and not the owner of a homestead, to hold exempt from levy and sale as aforesaid, personal property to be selected by such person, his agent or attorney, at any time before sale, not exceeding \$500 in value, in addition to the amount of chattel property now by law exempted. The value of said property to be estimated and appraised by two disinterested householders of the county, to be selected by the officer, etc." 66 Ohio L. 50.

The decisions of the courts of other States upon this question, under kindred statutes, are calculated rather to embarrass than satisfactorily aid us in the construction of our own statute.

The confused state of the law on this subject will appear from a ref

erence to the cases mentioned below, of which the effect only is given by way of illustration. *Stewart v. Brown*, 37 N. Y. 350, answers the question affirmatively.

Bonsall et al. v. Comly, 44 Penn. St. 442, answers it in the negative; while *Burns v. Harries*, 67 N. C. 140, decides that, if all the partners consent, the exemption must be allowed to each of the partners; but if such consent is not given, then it must be denied to all. There is direct conflict between the New York and Pennsylvania decisions; one or the other is right and must be followed. But we think the principles laid down by the North Carolina decision wholly unshakable. The statute confers a positive right, that, in a proper case, can be asserted against the world, and this is a dignity that inheres in all positive legal rights. In North Carolina, the right is so dwarfed that, in the case of partners, its exercise becomes a mere privilege, depending upon the mutual consent of the partners. It would be competent for the legislature to declare a right and prescribe the conditions upon which its exercise should depend; but where the statute creates and declares an absolute right, such right cannot be qualified, abridged, or extended by judicial interpretation. If, therefore, on a fair construction of the statute, insolvent partners, individually or collectively, are entitled to the statutory exemptions out of partnership property as against partnership creditors, let the right be granted and enforced by the courts; if not, let it be denied; and if the law is defective in this respect, let the defect be cured by proper legislation.

Looking alone to the language of the section above quoted, we find nothing to justify the inference that the legislature in passing it was intending to provide for other than individual debtors, and for the exemption of their individual property from sale on execution; and when construed in connection with the law relating to partnerships, as it had always stood and still stands, we are convinced that it could not have been the intention of the law-maker to bring partners or partnership property within the operation or provisions of the section in any respect.

Dealing with the statutory right, and excluding equitable considerations which have no place here, our convictions are based upon the fact that the right of exemption and the mode of exercising it prescribed by the statute, are wholly inapplicable to partnership property or the rights of the parties therein, and inconsistent with the rights of their creditors in relation thereto. The statute when applied does not affect the ownership of property in any way: it neither confers, takes away, nor changes the debtor's title by partitioning into severalty that in which there was a joint ownership or otherwise; but when properly invoked, it simply ex-

Gaylord v. Imhoff.

empts the designated property from execution and leaves the ownership as it was. The language of the section points unmistakably to property owned individually. The selection of the exempted property is to be made by the execution debtor, and the property selected is to be appraised and set off to the debtor. "Partners are joint tenants in their stock in trade, * * * and no partner has an exclusive right to any part of the joint-stock." 8 Kent, 37. Conceding that the interest of a partner in the partnership property may be seized in execution for his individual debt: Suppose a firm consisting of three or more members, and such a seizure in execution of the interest of one of them in the firm property, and suppose such debtor partner to be demanding the statutory exemption, we cannot see how he could select or the householders appraise and set off partnership property to him if the other partners objected; and even if the other partners were consenting, it is plain that it could only be done by first assigning certain of the goods to him in severalty, which would be obtaining his exemption by contract with the other partners, and not by virtue of the statutory right. But suppose a levy of execution on the firm property for a firm debt, and a demand for the statutory exemption made by one or two of the partners, and the others objecting to the exemptions being made, there would exist no right of selection by the demanding partners, and no power to set off by the officer, and hence there could be no exemption under these circumstances. The simple machinery of the statute is inapplicable and inadequate to the solution of such complications.

The right to the exemption, therefore, manifestly depends upon the power of selection, and this power must relate either to property of which the execution debtor is the absolute owner, or to property of which he has the possession and actual control as against the officer holding the execution.

But the court below held that where all the partners demanded the exemption, they were thereby all consenting to the exemption and it should therefore be allowed. The difficulties above suggested as to a single partner, or as to some demanding and others objecting to the exemption, arise and are equally potential here. The statute gives no countenance to the idea that there is to be a joint ownership in the property after it is exempted and set off; nor, as has been said, does it contemplate a partitioning into severalty of that which is joint property, in order to get at the property that may be exempted; and in order to get at the joint property to be exempted, where all were demanding it, the consent of all the partners would have to be given to each selection made by any one of them before it could be exempted and

set off. In short, where all were demanding it, the exemptions could only be made with the mutual agreement and consent of all the partners as to the selection of the joint property to be exempted. The right to make such consents and agreements would imply either an actual ownership of the property by the partners, or a possession coupled with an absolute power of disposition.

In this case, inasmuch as the partnership property had been seized in execution for a firm debt before the demands for exemptions were made, the legal effect of this seizure upon the property must be considered in order to ascertain whether a right of selection and exemption by consent of the partners remained after the seizure.

The law of partnership constitutes a system by itself, which is inapplicable to any other legal relation.

In speaking "of the origin and purpose of partnership," Mr. Parsons says: "If partnership offers advantages, it also exposes those who enter into it to peculiar liabilities. The safety of society requires this. If every partner were not held absolutely for the whole amount of the debts of the firm by whichever of the partners they were contracted, a wide door would be opened for fraud and public loss. It is, however, a very common thing for persons to try, in a vast variety of ways, to gain all the advantages and profits of partnership without encountering these liabilities; or to escape from these liabilities when loss has accrued. This the law forbids, and, as far as it can, prevents: and it must therefore be always ready to meet the contrivance, evasions and disguises resorted to by ingenious men." Parsons on Partnership, 4. One of the familiar rules in partnership is that the partnership property and assets are primarily liable for the payment of partnership debts; and no private creditor of a partner can take by his execution any thing more than that partner's share in whatever surplus remains after the partnership effects have paid the partnership debts.

The rule in equity on this point is thus admirably stated by Mr. Justice STORY: "Joint property is deemed a trust fund primarily to be applied to the discharge of partnership debts, against all persons not having a higher equity. A long series of authorities has established this equity of the joint creditors, to be worked out through the medium of the partners, that is to say, the partners have a right, *inter esse*, to have the partnership property first applied to the discharge of the partnership debts, and no partner has any right except to his own share of the residue, and the joint creditors are in case of insolvency substituted in equity to the rights of the partners as being the ultimate *cestuis que trust* of the fund to the extent of the joint debts." Story's Eq. Juris., § 1253.

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In the fact that, in connection with this peculiar system, public policy and the prevention of great losses to society requires each partner to be held absolutely for the whole amount of the firm debts, and equity, as to the partnership property, regards the partners as trustees holding it for the benefit of their creditors, we find a further reason for presuming that the exemption laws were not intended to apply to or affect partnership property; and we feel warranted in holding that the levy of the execution in this case was an absolute appropriation in law of the property levied on to the payment of a partnership debt, and that these partners, being insolvent, had no remaining interest either legal or equitable in the property. They could not, therefore, after the levy, acquire a right of exemption in the property by mutual agreement or otherwise, without the consent of the firm creditors. And while a court of equity, looking alone to the rights of all the creditors, might, in a case requiring it, have controlled the proceeds of the sale under the levy, it would not, on general principles, have had power to interfere to prevent a sale, or to deprive the plaintiffs of any legal advantages that their levy gave them. It follows that the law having seized and appropriated the property in question to its legitimate purpose—the payment of partnership debts—it was not within the power of a court of equity to take the proceeds of the property from the possession of the law, which held them for a specific purpose, and appropriate them to another. Although, as we have above found, the partners were not, and could not be entitled to the exemptions either in severalty, or jointly out of the partnership property, the court below found that the partners were entitled to five hundred dollars each out of the proceeds of the property, and decreed accordingly.

In this there was error. We think the judgment creditors and not the partners were entitled to the money arising from the sale.

Judgment reversed, and cause remanded for further proceedings.

WELCH, C. J., WHITE, REX and McILVAINE, JJ., concurred.

BURDICK v. CHEADLE.

(26 Ohio St. 393.)

Negligence — liability of landlord to third party for injury from defect in leased premises.

The defendant, being the owner of a lot of ground, erected thereon a storehouse, and afterward leased the store-room and agreed with the lessee to construct therein cor-

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cornices, shelvings and fixtures, in a secure, safe, convenient and proper manner for the sale of dry goods and groceries, and to keep the premises in good order. The fixtures put up under the agreement were unsafe and insecure from the want of sufficient fastenings to the walls of the building — all of which was known to defendant, who, on request of the lessees, refused and neglected to repair. Afterward, and while the room and fixtures were in the possession of the lessee, the shelvings fell and injured the plaintiff, who was, at the time, in the store-room as a customer of the lessee. *Held*, the facts stated do not constitute a cause of action against the defendant and in favor of the plaintiff *

ERROR reserved in the District Court of Fulton county.

The original action was prosecuted in the Court of Common Pleas of Fulton county, by plaintiff in error against Gilman Cheadle and Alexander Mattison, defendants in error, to recover for personal injuries caused through the alleged wrong and negligence of the defendants.

The questions in the case arise on the separate demurrer of Cheadle to the original petition. The demurrer, which was on the ground that the petition did not state facts sufficient to constitute a cause of action against the demurrant, was sustained by the court. In this ruling it is alleged there was error.

The facts stated in the petition (necessary to an understanding of the points decided) were substantially as follows :

Cheadle, being the owner of a lot in the town of Wauseon, in said county, erected thereon a brick building, designed to be used for store-rooms for the sale of dry-goods and groceries, and afterward leased to Hunt & Newcomer a room on the lower floor of the building for the sale of dry-goods and groceries, agreeing with them to complete certain cornices, shelving, and fixtures, then in process of construction in said room, in a secure, safe, convenient, and proper manner, for the sale of dry-goods and groceries, and to keep said premises in good order. In pursuance of his agreement with the lessees, Cheadle, before the 1st of September, 1871, caused to be constructed and put up cornices, shelving, and fixtures in the room, and fastened the same to the walls of the building. In the meantime, Newcomer had assigned his interest in the lease to Hunt, and Hunt, with the consent of Cheadle, had sublet the south part of the room to defendant, Mattison, for the purpose of retailing groceries. On the day last named, Hunt and Mattison, being in possession of the room, discovered that the cornices, shelving, and fixtures on the south

* See *Campbell v. Portland Sugar Co.*, 16 Am. Rep. 503 (62 Me. 552); *Clancy v. Byrne*, 15 Am. Rep. 391 (56 N. Y. 129) and note; *Leonard v. Storer*, 1 id. 76 (115 Mass. 86) and note; *Jaffe v. Harteau*, id. 438 (56 N. Y. 398); *Fisher v. Thirkell*, 4 id. 422 (21 Mich. 1); *Shipley v. Fifty Associates*, 3 id. 346; *Marshall v. Cohen*, 9 id. 170; *Irvine v. Wood*, 10 id. 170.

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side of the room were loose, dangerous, and unsafe to them and their customers, and notified Cheadle that the same were dangerous from want of proper fastening when first constructed, and requested him to repair the same, which he refused and neglected to do. It is also alleged that Cheadle knew how the shelving and cornices were constructed and fastened, and that they were unsafe as originally constructed.

Afterward, on the 23d of September, the plaintiff was lawfully in the room as a customer of Mattison, when the cornices and shelving, by reason of defects in their construction and neglect in repairing them, fell upon him, and inflicted the injuries for which suit was brought.

Hill & Trouvelle and *E. F. Greenough*, for plaintiff in error.

M. R. Brailey, *N. Merrill* and *M. & W. H. Handy*, for defendant, Cheadle.

McILVAINE, J. The plaintiff in error claims that by the rules of law, which declare and define the liabilities of persons who erect or maintain nuisances upon their estates, the liability of the defendant, Cheadle, for the injury complained of, may be ascertained. The rules relied on are—1. That an owner of real estate whereon a nuisance exists cannot exonerate himself from liability for injuries which may, at any time, result therefrom, by parting with the title or possession of the premises. 2. That a lessor who, as between himself and the lessee, is bound to keep the leased premises in good order, is liable for a nuisance which may originate during the continuance of the lease.

We do not think the defendant's liability can be asserted under either of these rules.

Whether the noxious structures existed at the time the lessees entered into the possession of the store-room does not appear; but however that may be, it is clearly stated that the injury complained of was inflicted during their possession. And that being the case, whether the nuisance (conceding the structures in question were such) was erected prior to the possession of the lessees, or originated afterward, the liability of the defendant, Cheadle, existed only in favor of persons standing strictly upon their rights as strangers to the property, and as to whom it was the duty of the defendant to remove or repair the structures. The duty here referred to does not arise upon the contract of lease, but is one which the law imposes upon the owners of property, and is expressed in the maxim, "*sic utere tuo ut alienum non laedas.*" This principle ordinarily applies only to persons in possession, and having control

of the property, either as owners or tenants. But in case a landlord undertakes with his tenant to keep the premises in repair, having thus reserved the control to the extent necessary for making repairs, his duty to the public in relation to the property is not affected by the lease, and he remains responsible, under the doctrine of the above maxim, for defects arising from the want of repairs during the continuance of the lease. But the plaintiff was not a stranger, standing strictly upon his rights as such. Indeed, the noxious fixtures complained of did not amount to nuisance at all in the legal sense of the term. They were not erected or maintained in violation of any right of the public, or of any member of the public. They were unsafe, it is true, but did not tend to endanger the person or property of strangers to the premises. They were unsafe to persons and things which might be for the time being in the store-room; but no person or thing could rightfully be there, except by the permission and upon the request of the lessees. No one doubts that the plaintiff was rightfully in the room at the time of the injury, but his only right was that of a customer of the tenant. Whatever, therefore, may be the rights of the plaintiff as such customer of the tenant, it is quite clear that he has no remedy against the lessor, as the erector or maintainer of either a public or private nuisance.

Nor can the plaintiff hold the lessor liable to him for the injuries sustained upon his contract of lease with the tenant in possession. In disposing of this question, we have regarded Mattison as standing in the shoes of the original lessees.

The general rule of law undoubtedly is, that persons who claim damages on the account that they were invited into a dangerous place, in which they received injuries, must seek their remedy against the person who invited them. There is nothing in the relation of landlord and tenant which changes this rule. There is no implied engagement or promise, on the part of a lessor, that the leased premises are in a safe condition, or that they are fit for the use to which the lessee intends to put them. If they be unsafe or unfit, it is the duty of the tenant to make them safe, or to fit them for the intended use; and the landlord may reasonably expect that the tenant will do so. And if the landlord warrants their fitness, the covenant stands for the benefit of the lessee and not for the benefit of strangers to the contract. And so, if the lessor engages with the lessee to keep the premises in repair, a breach of the engagement gives a right of action only to the lessee. But whatever may be the rights and duties respectively of landlord and tenant, as between themselves, the latter cannot, by the terms of the lease, be discharged from the duty to his guests, and in a greater degree to his cus-

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tomers, of caring for their safety. And while such persons may reasonably expect the exercise of care for their safety from the person who invites them, they have no right to expect like care from his landlord, with whom they are not in privity. Hence, it is well stated by Shearman and Redfield, in their work on Negligence (section 503), that the guests or customers of the tenant must seek redress for injuries, caused by defects in the premises, from the tenant and not from the landlord, even though the defects existed when the lease was made; for if they had not entered the premises at the request of the tenant, or under his license, they would not have suffered injury.

To what extent the tenant might have a remedy over against his landlord, where fraud was practiced in the letting, or where the defect resulted from want of repairs which the landlord engaged to make, we are not now called upon to decide.

It is also claimed that Cheadle's knowledge of the use to which the lessees intended to put the room, and of the fact that the cornices, shelving, and fixtures were insecurely fastened to the wall of the building at the time they were constructed, is sufficient to render him liable to the plaintiff for the injuries received by him.

It will be observed that there is no complaint as to the manner in which the building itself was constructed, and also, that the noxious fixtures were put in the buildings in pursuance of the contract of lease.

The fact that Cheadle had agreed with the lessees to contract the fixtures in a manner safe and proper for the sale of dry-goods and groceries, and the fact of his failure to perform his contract, are not elements in the plaintiff's right to recover. The plaintiff had no interest in that contract, or in the breach of it. The only question before us now is — Was Cheadle's neglect or failure to make the fixtures secure and safe, knowing that the room was intended to be used as a place of resort for the customers of the tenants, a breach of any duty which he owed to such customers? If so, a like duty to them would have been neglected, if any other person, with like knowledge, had carelessly put up the fixtures; and it would hardly be contended that if a carpenter, who had no interest in the premises, had been such other person, a right of action would have accrued against him and in favor of the plaintiff. We have already stated that Cheadle, by reason of his ownership of the room, owed no duty to the plaintiff, which was violated by mere carelessness in the construction or fastening of these fixtures; nor do we think that a legal duty, which would have been violated by neglect to exercise ordinary care, was imposed upon him by his knowledge that the room was to be kept open to the customers of the tenants.

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What would have been the responsibility of Cheadle, either civilly or criminally, if these fixtures had been intended by him as a trap or snare for the customers of the tenant, or if he had been guilty of such gross negligence as would show an utter disregard for the lives or safety of such customers, are questions not presented on his record. There is no averment of a design on the part of the defendant to injure such customers. That such injury was within the range of possibility is clear enough—it took place; but in the absence of averment, we cannot say that danger was so imminent as to indicate recklessness on the part of defendant. Indeed, it is difficult to conceive how an injury to customers could result from ordinary shelving, however carelessly constructed and fastened. For aught that appears in this record, these fixtures may have been in use for years, not only without injury, but without suspicion of possible injury to such customers. The averments that those shelvings were carelessly and insecurely fastened to the walls of the store-room and that Cheadle had knowledge of such fact, is by no means equivalent to an averment that he had reasonable grounds for apprehending that customers in the store-room would be in danger of injury therefrom.

Judgment affirmed.

WELCH, C. J., WHITE, REX, and GILMORE, JJ., concurred.

STATE V. LYMUS.

(26 Ohio St. 400.)

Larceny — dog not subject of.

Under the criminal law of Ohio, a dog is not the subject of larceny, and, therefore, an indictment charging that the defendant broke and entered a stable, in the night season, with intent to steal a dog, is not a good indictment for burglary.*

EXCEPTIONS of the prosecuting attorney to the ruling of the Court of Common Pleas of Logan county.

The facts necessary to understand the ruling excepted to, are stated in the opinion of the court.

* See see *Ward v. State*, 17 Am. Rep. 31 (48 Ala. 161); but see *Harrington v. Miles*, 15 id. 355 (11 Kans. 480) and note.—REX.

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Duncan Dow, prosecuting attorney, for plaintiff in error.

Wm. Lawrence, Joseph H. Lawrence, and E. D. Hunt, for defendant in error.

REX, J. The defendant was indicted at the March term, 1872, at the Court of Common Pleas of Logan county, for burglary.

The burglary consisted of breaking and entering a stable in the night season, with intent to steal property of value contained therein, to wit, a dog found therein, the property of the owner of the stable, of the value of twenty-five dollars.

The defendant moved to quash the indictment on the ground that it did not charge him with the commission of an offense which was punishable by the criminal laws of this State.

The court sustained the motion, and ordered the defendant to be discharged, holding "that there is no law authorizing the indictment, and that it does not charge a crime, offense, or misdemeanor."

The prosecuting attorney excepted to the ruling and decision of the court, and presented a bill of exceptions, embodying the indictment, motion, ruling, and decision of the court, and the exceptions taken thereto, which was signed and sealed by the court, and made part of the record in the case.

The only question presented by the exception is: Is the stealing of a dog a crime in this State?

The property intended to be stolen by the burglar must be property of which a larceny may be committed. We have no statute that, in express terms, declares a dog to be the subject of larceny; but it is claimed that inasmuch as the right of property in dogs is protected by civil remedies, and as a recent statute of this State requires them to be listed for taxation, they are property, and therefore properly the subjects of larceny.

We do not think so. Neither the fact that the right of property in dogs is protected in this State by civil remedies, nor the fact that recent legislation requires them to be listed for taxation, have the effect of enlarging the operation of the statutes defining and punishing larceny.

At the common law, although it was not a crime to steal a dog, yet it was such an invasion of property as might amount to a civil injury, and be redressed by a civil action. 2 Chit. Black. 393, 394; 1 Bish. Cr. Law, 1080.

In describing the property of which a larceny, either grand or petit, may be committed, the statutes of this State use the words "goods and

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chattels." These words at the common law have a settled and well-defined meaning, and when used in statutes defining larceny, are to be understood as meaning such goods and chattels as were esteemed at the common law to be the subjects of larceny. As dogs, at the common law, were held not to be the subjects of larceny, they are not included in the words "goods and chattels," as used in the statutes referred to.

Bonds, bills, notes, etc., are goods and chattels, and yet, as they were held not to be the subjects of larceny at common law, it was deemed necessary to so enlarge the larceny statutes as to declare the stealing or malicious destruction of them punishable in the same manner and to the same extent as the larceny of money or other goods and chattels of the same value.

So with dogs. It will be time enough for the courts to say that a dog is the subject of larceny when the law-making power of the State has so declared. "Constructive crimes are odious and dangerous." *Findlay v. Bean*, 8 Serg. & Rawle, 571.

We are therefore of opinion that the Court of Common Pleas did not err in the ruling and decision excepted to.

Exceptions overruled.

WHITE and McILVAINE, JJ., concurred. WELCH, C. J., and GILMORE, J., dissented.

 GREGORY v. STATE.

(26 Ohio St. 510.)

Forgery — what is.

Where A, for the purpose of defrauding B, procured C, an innocent party, to sign the name of B to a promissory note, by falsely representing that C was authorized by B so to do, *held*, that A was guilty of forgery.

MOTION for the allowance of a writ of error to the Court of Common Pleas of Franklin county.

The plaintiff in error was indicted and convicted, under section 22 of the Crimes Act, as amended by the act of March 24, 1865 (S. and S. 264), for uttering and publishing as true and genuine a certain false, forged, and counterfeited promissory note for the payment of \$300, knowing

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the same to be false, forged, and counterfeited, with intent to defraud a certain person named in the indictment.

The note purported to have been made by Daniel Bevis, payable to the order of E. W. Phelps four months after date, or sooner, if made out of the sale of E. W. Phelps' harvest and saw-sharpener; was dated June 13, 1874, and indorsed "E. W. Phelps."

On the trial, evidence was given tending to prove that, at the date of the note, negotiations were pending between the plaintiff in error and Daniel Bevis, who resides in Prospect township, Marion county, in this State, which resulted in Bevis agreeing to become agent for the sale of the machine above named, in certain townships of Marion and Union counties, to complete which a contract was to be signed in duplicate by Bevis; but as he was unable to write his name, his daughter Rebecca Jane was called, and directed to sign his name to the contract for him; that while Rebecca Jane was at the table to sign the contract for her father, Miles Gregory, a brother of the plaintiff in error, engaged Mr. Bevis in the inspection of, and conversation about, some pictures that were hanging on the wall at the side of the room opposite that at which the writing was being done, and after she had signed the contract, the plaintiff in error produced the note set out in the indictment, and requested her to sign her father's name to it, saying that it was "a little agreement between her father and himself;" that she signed it, as requested by the plaintiff in error, without further inquiry; and that the name of Daniel Bevis was signed to the note by his daughter, without his authority, knowledge, or consent.

After the close of the argument, the court charged the jury, among the other instructions given, as follows: "In this case it is admitted that the name of Bevis was written on the note by Miss Bevis, the daughter of Bevis (Bevis not being able to write his name, as he testifies). Now, if you are satisfied beyond a reasonable doubt that Bevis and the defendant had agreed in regard to the papers Bevis was to sign to complete the negotiation in hand between them — that a promissory note was not one of the papers Bevis had agreed to sign, that it was not understood by him that he was to sign, and he did not intend to sign, a promissory note, all of which was known to the defendant; that Bevis being unable to write his name, his daughter was called on to act for him in signing such papers as he understood and agreed he would sign — then, and in such case, and to that extent, she was the agent of Bevis, and when she had written his name to those papers, her agency for him ceased. And if you shall further find that the defendant, without the knowledge and consent of Bevis, and with intent to defraud, directed and procured her

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to sign the name of Bevis to the promissory note in evidence, she acted in that respect for the defendant. In law, it was the act of the defendant, and the signature so procured was a forgery, and the note was a false and forged instrument." To which the plaintiff in error excepted.

After verdict, a motion was made to set it aside and for a new trial, which was overruled by the court and excepted to; and, after sentence, the plaintiff in error presented his bill of exceptions, embodying the evidence, rulings, and charge of the court, which was signed and sealed by the court, and made part of the record.

The reasons for this motion appear in the assignment of error on the transcript of the record on file in this case.

Pond & Jones and *Geo. K. Nash*, for plaintiff in error, claimed this was not a case of forgery (S. and C. 409, as amended S. and S. 264), but the procuring the signature of a person to a promissory note by a false pretense or pretenses (S. and C. 429, as amended 70 Ohio L. 39). See 3 Chitty's Crim. Law, 1006; 2 Bishop's Crim. Law, §§ 472, 473; Wharton's Crim. Law, § 1441; *Putnam v. Sullivan*, 4 Mass. 53; *Hill v. The State*, 1 Yerg. 76; *Wright v. People*, 1 Breese, 66; *Reg. v. Collins*, 2 Moody & Rob. 46; *id.* 54; 2 Bishop's Crim. Law, § 590; 1 *id.*, § 584; 22 Penn. St. 394.

That Rebecca did not act as the agent of Gregory, but as the agent of her father, Bevis, and was induced to do so by the false representations of Gregory. 3 Chitty's Crim. Law, 1006; 2 Bishop's Crim. Law, §§ 472, 473.

John Little, attorney-general, and *J. H. Outhwaite*, prosecuting attorney, for the State. Rebecca was not the agent of her father in signing the note (1 Parsons on Contracts, 89, 40, 44), but the agent of Gregory; and the signing was the signing of the principal, Gregory, and was forgery. 2 Car. & Kir. 528; Wharton's Crim. Law, § 1419; 2 Car. & Kir. 201.

REX, J. Numerous errors are assigned on the record; but the errors relied on by counsel for the plaintiff in error in argument are:

"1. That the court erred in overruling the motion of the defendant to take the testimony of Daniel and Rebecca Jane Bevis from the jury.

"2. That the court erred in its charge to the jury.

"3. That the verdict was against the weight of the evidence in the case."

The first and second propositions present for decision the same question, viz.:

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Whether the procuring by the plaintiff in error of the signature of Daniel Bevis to the promissory note set out in the indictment, in the manner shown by the evidence, was a forgery by him?

The reasons urged by counsel in support of the motion of the plaintiff in error to withdraw the testimony of Bevis and his daughter from the jury are: that as the daughter was acting as the agent of her father, in signing his name to the contract, she continued to act in the same capacity in signing his name to the promissory note, although she was not authorized so to do by her father, and was induced thereto by the false pretenses and representations of the plaintiff in error; and, therefore, that the plaintiff, if guilty of any crime, is guilty of procuring, by false pretenses, the signature of Daniel Bevis to the promissory note, as the maker thereof, which is also made punishable by statute; and the same reasons are urged in support of their second claim, "that the court erred in its charge to the jury."

We do not think that these reasons are well founded. The acts of the agent, to bind the principal, must be within the scope of the authority given to the agent, and if the signing of her father's name to the promissory note was not within the scope of her authority as his agent, the false pretenses and representations of the plaintiff in error could not and did not extend her authority as such agent.

In this case the agency of the daughter for her father extended to the signing of his name to the contract in duplicate, and no farther. When, therefore, these two papers were signed, her agency for her father ceased. The evidence in the case tends to show that this was the extent of her authority as such agent, and that she was induced to sign the promissory note by the representations of the plaintiff in error, and at his request, believing at the time that the representations were true.

In signing her father's name to the promissory note, Rebecca was therefore the innocent agent of the plaintiff in error, and hence her act was the act of the plaintiff in error, and was a forgery. *Reginuld v. Clifford*, 2 Carr. & Kir. 202.

We are, therefore, of opinion that the court did not err in overruling the motion of the plaintiff in error to withdraw the testimony of the witnesses named from the jury, nor in its charge to the jury.

The evidence set out in the bill of exceptions, in our opinion, fully sustains the verdict.

Motion overruled

WELCH, C. J., WHITE, GILMORE and McILVAINE, JJ., concurred

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KNIGHT V. THE EUREKA FIRE AND MARINE INSURANCE CO.

(26 Ohio St. 664.)

Marine Insurance — insurance by part owner—double insurance.

A part owner of a vessel, in whose name a policy of insurance on the whole vessel, for account of the owners, is issued, becomes a trustee for all the owners, and, in case of loss, may sue on the policy in his own name alone.

A part owner of a vessel has no authority, by reason of the joint ownership, to insure the interests of the other owners; hence, a policy taken upon the whole vessel in his own name, without previous authority or subsequent ratification by the other owners, is invalid, except as to the interest of the part owner obtaining it.*

Where such policy was intended by the insurer to cover the whole vessel for the benefit of all concerned, but is invalid, except as to the interest of the part owner procuring it, the insurer is only liable to such part owner for such a portion of the sum insured as his interest bears to the whole.

Where a policy of insurance contains a condition of avoidance on account of additional or over-insurance, such policy is not avoided by contract for additional insurance, where it is shown that such contract is invalid as to all excessive insurance.†

MOTION for leave to file a petition in error to the Superior Court of Cincinnati.

The action in the court below was brought by plaintiff in error against the defendant in error, to recover the balance of \$1,500 claimed to be due upon a policy of insurance against loss by fire, for one year, issued on the 20th of September, 1870, by the defendant to the plaintiff for \$3,000, on the steamboat Lightwood, on account of the owners—loss, if any, to be paid to the assured. The then owners of the boat were the plaintiffs, George A. Knight, Joseph Fisher, James M. Kirker, William Kirker, and John Kirker—each owning one-fifth interest.

The policy of insurance contained the following condition: "This policy shall become void, if any further insurance has been or shall be made on said vessel, which, together with this insurance, shall exceed the sum of six thousand dollars."

On the 10th of March, 1871, the boat was totally destroyed by fire.

In defense to this action the defendant alleged a breach of the above condition. And on the trial of the cause in the court below, at special term, the admissions of the parties and the tendency of the testimony offered were to the effect following: The policy sued on, when is-

* See *Sleeper v. Union Ins. Co.*, ante, p. 706.

† See *Thomas v. Builders' Ins. Co.*, ante, p. 317, and note; *Lindley v. Union Ins. Co.*, ante, p. 701.

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sued, was taken in the name of the plaintiff under authority from the then owners of the boat; afterward, on the 9th of February, 1871, the three Kirkers sold and transferred their respective interests in the boat to one Isaac N. George, for the sum of \$4,500, one-third of which was paid in cash, and the balance was secured by the acceptance of the firm of Fisher, Johnson & Co.; on the same day, George, being then owner of three-fifths of the boat, obtained a policy of insurance against loss by fire in his own name, but stated to be for the benefit of those concerned, for the sum of \$4,500, on the whole boat, from the Louisiana Mutual Insurance Company — loss, if any, payable to Fisher, Johnson & Co. This latter insurance was effected without the knowledge or authority of either the defendant or the owners of the other two-fifths of the boat, nor has either of them assented to or ratified the same. On the 22d of February, 1871, the plaintiff having learned of the purchase by George of the Kirkers' interests in the boat, but being ignorant of the insurance by the Louisiana Mutual Insurance Company, presented the policy sued on to the defendant, with information of the sale to George, and thereupon the defendant, by its secretary, indorsed on the policy, "February 22, 1871. For account of present owners. E. E. Townley, Secretary." This indorsement was procured without the knowledge of or authority from I. N. George, for whose use it was intended, nor does it appear that he has at any time since assented to or ratified the same.

After the loss of the steamboat, the Louisiana Mutual Insurance Company paid the amount of its policy to the parties named in the policy to receive it; and upon proof of the loss being made to defendant, it paid to the plaintiff the sum of \$1,500, but refused to pay the balance of the amount insured, because of the alleged breach of the condition in its policy.

The Louisiana Mutual Insurance Company issued its policy upon the following application:

"To the Louisiana Mutual Insurance Company. Please enter \$4,500 on open policy No. 1,377, for Isaac N. George, on the hull and tackle, and loss, if any, payable to Fisher, Johnson & Co., of the steamboat Lightwood, valued at \$6,000, at and from February 9, 1871, privileged to navigate between New Orleans and Bayou Bartholomew. If stored waiting to be reshipped, this insurance does not cover the fire risk while on shore. Premium six per cent, \$270. I. N. GEORGE."

Thereupon the plaintiff requested the court to charge the jury, "that if they found from the evidence that at the time Isaac N. George procured the said insurance of forty-five hundred dollars, he, the said Isaac

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N. George, represented himself as the sole owner of the boat insured, and that the Louisiana Mutual Insurance Company issued said policy to him as the entire owner, and thought he was the entire owner, when in fact said George was the owner of only three-fifths part of said boat, then he was entitled to recover no more in law than three-fifths of the sum insured, and that no more than three-fifths of said sum of \$4,500 could be estimated in making up the additional sum of insurance on said boat." This instruction the court refused to give, but did charge the jury as follows:

"This suit is brought to recover a balance of \$1,500, with interest, as prayed for in the petition, on a policy of insurance issued by defendant to the plaintiff, for the benefit of all the owners, on the steamboat Lightwood, which was burned. When the insurance was effected, or by purchase shortly afterward, it is admitted the plaintiff owned two-fifths of the boat, and other parties three-fifths. The latter sold their three-fifths interest to one George; and afterward the defendant indorsed on the policy its consent to such part change of ownership.

"The policy contained a provision that if the boat should be insured for more than \$6,000, without the defendant's consent, the policy should be void. But since the loss, and with a full knowledge of all the facts, the defendant paid the plaintiff on account of the loss \$1,500, and has refused to pay any more.

"George, without the plaintiff's knowledge or consent, and without the knowledge and consent of the defendant, the Eureka Insurance Company, procured an insurance upon the boat (the entire boat) in a New Orleans company, in the sum of \$4,500, for the benefit of Fisher, Johnson & Co., of New Orleans, his creditors for that sum, which policy had the same provision, as to becoming void if insurance should be effected without the company's consent, beyond \$6,000; of which forfeiture clause, I may here say, no one but the New Orleans Insurance Company can take advantage. The defendant had no knowledge, as is admitted, when it indorsed on the policy here sued on its consent to the change of ownership from the original owners to George. It is admitted that, after the loss, the New Orleans company paid the \$4,500 in full according to the terms of its policy, and that the defendant has paid this plaintiff \$1,500 on the policy now sued on.

"You will thus see that the boat became insured for \$7,500, or \$1,500 over the limited sum of \$6,000. Now, if this \$3,000 was the only insurance upon the boat, the plaintiff would be entitled to \$1,200 only, as between him and George, and George \$1,800; or the plaintiff \$600 in this suit, and George \$900. But George obtained \$4,500 from

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the New Orleans company, when he was entitled, as between him and the plaintiff, to \$2,700 — \$1,800 being received by him as money had and received for the use of the plaintiff. The plaintiff has been paid by this defendant \$300 more than his individual portion of this entire policy; and upon the above facts I charge you that he is not, in law, entitled to recover any thing further, for such would be for the three-fifths interest of George, which has been fully paid to George."

To the refusal to charge as requested, and to the charge as given, the plaintiff excepted.

Verdict and judgment were given for the defendant, and on error, in the general term of the court, the above judgment was affirmed.

Leave is now asked to file a petition in error to reverse the judgment below, for error in refusing to charge as requested, and in the charge as given to the jury.

Donham & Foraker, for the motion, cited 4 Mass. 647; 8 Metc. 848; 2 Cranch, 419; *Lucas v. Jefferson*, 6 Cow. 635.

Lincoln, Smith & Stevens, contra. On account of over-insurance, the defendant's insurance was wholly void. *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Conway Tool Co. v. Hudson River Ins. Co.*, 12 Cush. 144; *Mussey v. Atlas Mutual Ins. Co.*, 14 N. Y. 79; *Insurance Co. v. Stockbower*, 26 Penn. St. 199.

McILVAINE, J. The questions raised on the record before us should be determined by the following principles and rules of law:

1. A part-owner of the vessel, in whose name a policy of insurance on the whole vessel, for account of the owners, is issued, becomes a trustee for all the owners, and in case of loss, may sue on the policy in his own name alone.

2. A part-owner of the vessel has no authority, by reason of the joint-ownership, to insure the interests of other owners; hence, a policy taken upon the whole vessel in his own name, without previous authority or subsequent ratification by other owners, is invalid, except as to the interest of the part-owner procuring it.

3. Where such policy was intended by the insurer to cover the whole vessel for the benefit of all concerned, but is invalid except as to the interest of the part-owner procuring it, the insurer is only liable to such part-owner for such portion of the sum insured as his interest in the vessel bears to the whole.

4. Where a policy of insurance contains a condition of avoidance on

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account of additional or over-insurance, such policy is not avoided by an alleged contract for other insurance, when it is shown that such contract is invalid as to all excessive insurance.

When the refusal to charge as requested, and the charge as given by the court below are tested by these rules, manifest errors appear. The instruction requested should have been given. The suggestion that it was an abstract proposition is not well made. The testimony tended to prove the facts named in the request. The rules of law embodied in this request are founded on the soundest principles. An insurer may implicitly rely on the information received from the applicant, in relation to the subject-matter, and the persons to be insured. If the Louisiana Mutual Insurance Company undertook to insure George in the sum of \$4,500, upon the whole boat, believing from the representations of George, that he was the sole owner, while in truth he had an insurable interest only in three-fifths of the boat, it would be palpably unjust to hold the company as an insurer to the full amount named upon only a fraction of the property intended to be covered. If such representations had been fraudulently made, there is no doubt the policy would have been void *in toto*, and, being innocently but carelessly made, the contract should not be enforced for more than the proportion of the risk assumed which George's interest bore to the whole vessel. It was upon the whole vessel, estimated to be worth \$6,000 (in the application), that the company assumed a risk of \$4,500. Upon three-fifths of the vessel it assumed the risk of no more than \$2,700. There was, therefore, no valid insurance upon this boat or any of its parts, under the Louisiana Mutual Insurance Company's policy, for more than \$2,700. And by looking further into the record, we find that when this request was refused, the case, as it stood upon the admissions of the parties, showed that George had no authority from the owners of two-fifths of the vessel to insure their interest; hence, if the policy were to be construed as an insurance for the benefit of all the owners in the sum of \$4,500, it would still be invalid as to the two-fifths of the amount of a risk. For I take it to be perfectly clear, that if the parties to this policy intended two-fifths of the risk assumed for the benefit of part-owners of the vessel who were not represented in the contract, and who never ratified it, George would have no right to apply to losses sustained by him on account of his three-fifths of the vessel, that part of the sum insured which was intended to cover losses on account of the two-fifths, which, by want of authority or ratification, were not insured at all.

Now, the limitation upon the aggregate insurance, contained in the condition of the policy sued on, was \$6,000. The amount of valid

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insurance obtained on the vessel, and on its parts, was \$5,700, while the amount named in the two policies was \$7,500. The former sum being less than the amount limited, and the latter in excess of it. To which of these amounts does the condition in the policy sued on relate? If to the former, the policy has not been avoided under the condition; if to the latter, it is void. The condition is: "This policy shall become void if any further insurance has been or shall be made on said vessel, which, together with this insurance, shall exceed the sum of six thousand dollars." An agreement for insurance made by an unauthorized agent, unratified, is no contract of the principal. Invalid insurance is no insurance. We must, therefore, construe this condition as referring to valid insurance.

It is said that the evils intended to be avoided by conditions against over-insurance are as likely to result from invalid agreements for excessive insurance as from valid contracts. This may be so in some instances; and we have no doubt a stipulation against such evils, in either case, might be made; but the question here is not as to what stipulations might be imposed by insurers, but what is the stipulation in this condition?

It is true the terms of this condition should be construed fairly; and it is but fair to say that they must also be strictly construed. The condition was intended to provide for a forfeiture of the contract of insurance, and a forfeiture should not be declared by construction, when the strict terms of the condition do not require it.

I should here add that the fact that the Louisiana Mutual Insurance Company paid the full amount of its policy has nothing to do with the question before us. If the policy sued on was not made void by the obtaining of the policy from the Louisiana Mutual Insurance Company, it was not avoided by the payment of it.

We think the court below also erred in the charge given, in assuming in the face of the admissions upon the record, that two-fifths of the money paid by the Louisiana Mutual Insurance Company to George were received by him for the use of the plaintiff below. Also in holding that George had already received his full share of the insurance effected under the policy sued on.

With regard to George's interest in the policy sued on, it is thought proper to remark that the principles above stated are generally applicable to it.

The facts in relation to George's insurance under this policy are not fully set forth in the record. It does appear, however, that the insurance was originally obtained upon three-fifths of the boat for the benefit

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of the Kirkers, who afterward sold all their insurable interests in the boat to George. By this alienation the policy lapsed as to three-fifths of the insurance. The subsequent effort of the plaintiff, Knight, to revive the lapsed insurance for the benefit of George, may or may not have been successful. That Knight had no authority from George to insure his interest at the time the policy was revived in favor of the then owners, to wit, on the 22d of February, 1871, is shown; but whether or not that act was afterward ratified by George does not appear. If this policy became effective as an insurance in George's favor, the plaintiff as his trustee may rightfully prosecute this action for his benefit. But if George was not insured by this policy, it is clear that the plaintiff has no remaining right of action under it, as it is admitted that he has already received from the defendant \$1,500, which is more than the ratable share of the insurance upon two-fifths of the boat owned by himself and Fisher at the time the insurance was first effected and at the time of the loss.

Motion granted. Judgments reversed, and cause remanded.

WELCH, C. J., WAITE, REX and GILMORE, JJ., concurred.

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ABANDONMENT.

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ACTION.

1. *Lis pendens — sufficiency of — surplusage.*] A notice of *lis pendens* was filed containing a correct statement of all the facts required by the statute to be stated, and, in addition thereto, an incorrect description of the property "intended to be affected" thereby. *Held*, that the description should be rejected as surplusage, and that the notice was sufficient. *Watson v. Wilcox* (Wis.), 63.

2. *For damages for contracting to sell property without authority.*] Defendants, falsely pretending to have authority to sell plaintiff's land, made a contract to sell to a third party. *Held*, that they were liable to plaintiff for his costs and expenses incurred in defending a suit by such third party for specific performance of the contract. *Philpot v. Taylor* (Ill.), 241.

3. *For negligence — contributory negligence — violation of statute.*] In an action against a town for injuries sustained by a defect in a highway, *held*, that the fact that plaintiff was at the time traveling on the wrong side of the road in violation of the statute, did not, as matter of law, defeat the action if his own fault or negligence did not contribute to the injury; but that it was competent evidence of negligence on his part for the jury. *Damon v. Inhabitants of Scituate* (Mass.), 315, and *note*, 317.

4. *Parties — joint liability when severed.*] Where a person, answerable in contract to two jointly, settles with one of them so that one has no longer any real interest in the matter in dispute, it is a severance of the cause of action, and the debtor is liable in an action at law to the other alone. *Boston and Maine R. R. v. Portland, etc., R. R. Co.* (Mass.), 338.

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Liability of owner for acts of ferocious dog. Damages—evidence of defendant's pecuniary circumstances] Defendant left his dog unsecured in his sleigh in a village street, knowing that the dog was ferocious and accustomed to bite people, and that, on one occasion when so left, he had attacked a passer-by. The plaintiff, a child of seven years, came to the sleigh and meddled with the whip, whereupon the dog threw him down and bit him. *Held*, (1) that the defendant was liable; (2) that if the jury find that the defendant was guilty of gross and criminal negligence, they may give exemplary damages, and (3) that evidence of defendant's pecuniary circumstances was proper. *Meibus v. Dodge* (Wis.), 6.

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See CRIMINAL LAW, 269, 464.

ASSAULT AND BATTERY.

Prize fighting—consent.] Where two persons, by mutual agreement, engage in a fight with each other, each is guilty of an assault and battery, although there is no anger or ill-will. *Commonwealth v. Colberg* (Mass.) 328, note, 330.

ASSESSMENT.

- 1 *For local improvements.*] A statute authorized commissioners to assess the cost of a sewer upon lands benefited thereby in such proportion as they should think just and equitable. *Held*, that no valid assessment could be made under the statute, as it failed to determine the mode of distributing the burden. *State v. Commissioners*, (N. J.), 380.
- 2 *What report must show.*] The report of commissioners must show on its face a compliance with all legal rules, the observance of which is necessary to constitute a valid assessment. *Ib.*
3. *How apportioned.*] An assessment for a sewer upon designated lands, in proportion to area or frontage, is not, as a method of assessment, supportable. *Ib.*
4. *Estoppel.*] The fact that a land-owner has connected his lands assessed with the sewer does not estop him from questioning the legality of the assessment. *Ib.*

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ASSIGNEE.

Liability of assignee in bankruptcy of railroad for injuries occasioned in operating.] *See* NEGLIGENCE, 533.

ATTACHMENT.

1. *Sale of attached property — bankruptcy of defendant.*] Personal property was attached, receipted for, restored to the defendant and sold by him to an innocent purchaser. The defendant became bankrupt more than four months afterward, but before judgment. *Held*, that the attachment was not dissolved and that the plaintiff might have a special judgment *in rem* and levy his execution on the money collected of the receiptor. *Batchelder v. Putnam* (N. H.), 115.
 2. *Of insurance money in hands of insurer.*] An insurance company is liable as garnishee or trustee of the insured after a loss, though the property insured was exempt from attachment. *Wooster v. Pugs* (N. H.), 128.
- Effect of composition in bankruptcy on.*] *See* BANKRUPTCY, 111.
- Judgment in suit of, after discharge of defendant in bankruptcy.*] *See* BANKRUPTCY, 333.

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ATTORNEY.

1. *Admission of women to the bar.*] Where the statute relating to the admission of attorneys applied in terms to males only, *held*, that it would not be construed to include females because of the statutory rule of construction that "words of the masculine gender may be applied to females." *Matter of Goodell* (Wis.), 42.

- 2 *Must be resident of the State.*] A non-resident cannot be admitted to the bar although he be a counselor at law in good standing where he resides, and a statute authorizing such admission is invalid. *Matter of Moenness* (Wis.), 55.
- 2 *Lien of, by what law governed — conflict of laws.*] The lien of an attorney upon a judgment recovered by him is governed by the law of the State where the judgment was recovered and the lien attached, and not by the law of the State where the judgment is sought to be collected. *Citizens' National Bank v. Culver* (N. H.), 184.
- Statute requiring to take out and pay for license to do business valid.*] See LICENSE, 200.
- When party not liable for trespass authorized by his attorney.*] See TRESPASS, 519.
- When infant liable for fees of.*] See INFANT, 160.

BAIL.

1. *Surrender by — liability of surety where surrender is prevented by act of law.*] Bail are entitled to relief when the surrender of the principal is made impossible by the act of the law, where the plaintiff loses nothing by the omission of any act which it is in the power of the bail to perform. Whether relief will be granted by bringing up the principal on *habeas corpus*, or by extending the time for surrender, or by granting a discharge on motion, will depend upon the fact whether the one mode will be more beneficial to the plaintiff than the other. *Steelman v. Mattie* (N. J.), 889.
- 2 —.] The defendant M. gave bond under the insolvent laws, conditioned that he would surrender himself to the sheriff of Atlantic county if his discharge as an insolvent was refused. At the time his discharge was refused, he was in the county jail of said county, prior to his removal to the State prison, to which he had been sentenced for crime. *Held*, that this did not excuse an actual surrender of M. to the sheriff. He could have said to the sheriff that he put himself into his custody according to the condition of the insolvent bond, and this would have enabled the sheriff to retake him after he had been liberated from incarceration on the criminal charge. *Id.*

BAILMENT.

- Bailee estopped to deny bailor's title.*] Plaintiff purchased property of J. S. and lent it to defendant to be returned upon demand. J. S. was afterward adjudged a bankrupt, and the defendant, while so holding as bailee, bought the property of the bankrupt's assignee. *Held*, that defendant could not set up against the plaintiff the title so acquired even if the original transfer to plaintiff was in fraud of the bankrupt act. *Nudd v. Montanye* (Wis.), 25.
- Action by bailee of goods against carrier for misdelivery.*] See CARRIER, 227.

BANK.

See NATIONAL BANK.

BANKRUPTCY.

1. *Effect of composition upon attachment.*] Plaintiff attached defendant's property on *mesne* process. A month after defendant was duly adjudicated a bankrupt upon the petition of his creditors; but a composition was effected under the act of 1874. Plaintiff took no part in the composition, but his name and address and the amount of his debt were duly shown in the debtor's statement and the amount due him under the composition was tendered and refused. *Held*, that the debt of the plaintiff was extinguished by the composition, and the attachment should be quashed. *Miller v. Mackensie* (Md.), 111.
2. *Contingent debts — when liability of surety on bond continues after discharge.*] In an action against a surety on a bond given to secure the damages and costs occasioned by an injunction, the defendant pleaded his subsequent discharge in bankruptcy. Replication that the suit in which the injunction issued was not determined until after such discharge. *Held*, that the replication was good. *Eastman v. Hubbard* (N. H.), 157.
3. *Judgment in attachment suit.*] Plaintiff attached defendant's property in an action upon a debt provable in bankruptcy. More than four months thereafter defendant was adjudged a bankrupt. *Held*, that in case there had been no unreasonable delay in obtaining the discharge, plaintiff was not entitled to a judgment enforceable against the property, until the question of the defendant's discharge was determined. *Ray v. Wight* (Mass.), 333.
4. *Fraudulent preference.*] A bankrupt gave to a creditor his note indorsed by a third person. *Held*, not a fraudulent preference, as the advantage secured by the creditor was not out of the bankrupt's estate. *Dalrymple v. Hillenbrand* (N. Y.), 438.

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BOND.

Stolen, action on, by bona fide purchaser.] County bonds lawfully issued, with a blank left for the name of the payee, were stolen. *Held*, that they were valid and negotiable, and that a bona fide purchaser could hold them against the true owner. *Boyd v. Kennedy* (N. J.), 376.

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See TAX, 547.

BRIBERY.

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BRICKBURNING.

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BRIDGE.

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BROKER.

N. v. entitled to commissions from both seller and buyer — custom.] A real estate broker was employed by A to sell a farm. He exchanged it for lands of B, receiving a commission from A for his services. *Held*, that he could not recover a commission from B also, either on proof of an express promise by B to pay, or of a usage among brokers to charge commissions to both parties. *Raisin v. Clark* (Md.), 66.

BURDEN OF PROOF.

As to alteration of instrument.] *See* NEGOTIABLE INSTRUMENTS, 834.

CARRIER.

1. *Action against, by bailee, for misdelivery.*] Plaintiff, a common carrier, received goods marked "C. O. D.," to be delivered at a point beyond his line, and delivered them to defendant, a connecting carrier, to be transported to their destination and delivered. Defendant delivered them without collecting payment. *Held*, that the plaintiff could maintain an action against defendant for such wrongful delivery. *Murray v Warner* (N. H.), 227.
2. *Express company — limitation of liability — duty of shipper to state value.*] Plaintiff delivered goods for carriage to defendant's express company, and received a receipt containing a provision exempting defendant from liability beyond fifty dollars for loss of the goods, unless their value was stated by the shipper. *Held*, that mere silence on the part of the plaintiff as to the real value of the goods, although there was no inquiry by the carrier and no artifice used to deceive, was fraud in law, and relieved the carrier from liability for a loss of the goods beyond the fifty dollars. *Magnin v. Dinmore* (N. Y.), 442.
3. *Measure of damages.*] Where goods are sent to a consignee with an option to take them at a price stated or to return them, the measure of damages for their loss by a carrier is the price fixed, with interest from the day the goods would, in the ordinary course of transportation, have reached the consignee. *Ib.*
4. *Limitation of liability — shipper bound by conditions in receipt, though unread by him.*] Plaintiff delivered goods to defendant's express company

for transportation, and received a receipt containing a condition that the company was not to be held liable for any loss occasioned by the dangers of transportation. The goods were lost *en route* without fault or negligence. Plaintiff did not read the receipt, and the condition was not brought to his knowledge. *Held*, that plaintiff was bound by the condition, and that defendants were not liable. *Kirkland v. Dinsmore* (N. Y.), 475.

5. *Damages for expulsion of passenger.*] A passenger who had purchased a ticket for a berth in a sleeping-car, lost it, and gave evidence to the conductor that he had done so, and refused to pay over again, whereupon the conductor expelled him, without violence, from the car, and he was compelled to ride in a common car. *Held*, that plaintiff could recover of the owners of the sleeping-car the price he paid for his ticket and a reasonable compensation for his trouble and inconvenience, but that he could not recover exemplary damages, and that a verdict for \$3,000 was excessive. *Pullman Palace-Car Co. v. Reed* (Ill.), 233.

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See CARRIER.

CONFLICT OF LAW.

Contract of affreightment—place of performance.] Plaintiff delivered to defendant at Hartford, Connecticut, goods to be transported to Des Moines, Iowa, and received a bill of lading exempting the defendant from liability for losses by fire. Such exemption was valid in Connecticut, but was void in Iowa. The goods were destroyed by fire at Chicago, while *en route*. *Held*, that the contract was governed by the laws of Connecticut, and the exemption was therefore valid. *Talbot v. Merchants' Dispatch Transportation Co.* (Iowa), 589.

As to lien of attorneys.] *See* ATTORNEY, 124.

CONSIDERATION.

Agreement to withdraw objections to bankruptcy proceedings.] The consideration of a contract was, that one of the contracting parties should withdraw opposition to bankruptcy proceedings pending against his firm, and consent to an adjudication against them. *Held*, that the consideration was valid. *Sanford v. Huxford* (Mich.), 648.

When sufficient to sustain action.] See INSURANCE, 106.

Note for embossed money.] See NEGOTIABLE INSTRUMENTS, 288.

Mortgage given for embossed money.] See ILLEGAL CONTRACT, 631

Moral obligation as.] See INFANT, 399.

CONSTITUTIONAL LAW.

1. *Statute authorising counselor to act as judge—mistrial.]* A statute authorized actions, in which the judge was interested or prejudiced, to be tried by consent of the parties, before a counselor of the court. *Held*, that the statute was unconstitutional, that a person assuming to act under it was not even a judge *de facto*, and that his judgment was absolutely void. *Van Slyke v. Trempealeau Ins. Co.* (Wis.), 50.
2. *Trial by jury—compulsory reference.]* A statute authorized courts, without the consent of parties, to commit any cause to a referee for trial, and provided that after such trial, the cause should, at the request of either party, be tried by a jury, and that upon such trial the report of the referee should be evidence of all the facts stated therein, subject to be impeached by either party. *Held*, that the act was constitutional so far as it authorized a compulsory reference; but *quære* as to the provision making the referee's report admissible. *Copp v. Henniker* (N. H.), 194.
3. *Verdict of jury—confinement of one acquitted on the ground of insanity—due process of law.]* A statute provided that, when the defense of insanity was set up upon the trial of an indictment for murder, etc., the jury should find specially whether the defendant was insane when the alleged crime was committed, and that, if they acquitted on that ground, the verdict should so state; that, thereupon, the court should sentence the defendant to confinement in the insane hospital until such time as the governor should discharge him; that such discharge should be granted whenever the prison inspectors should summon certain officers named, to examine the defendant, and they should certify to the governor that he was no longer insane. *Held*, (1) that the jury had the constitutional right to give a general verdict, but that a special verdict was not unauthorized; (2) that the statute was unconstitutional in that it provided for depriving one of his liberty without due process of law. *Underwood v. People* (Mich.), 633.
4. *Fourteenth Amendment to the Federal Constitution—depriving paupers of liberty without due process of law.]* A State statute authorized two overseers of the poor in any town, by writing under their hand, to commit paupers and vagrants to the work-house. *Held*, in violation of the Fourteenth Amendment to the Constitution of the United States, as it deprived

a person of liberty without due process of law. *Portland v. Bangor* (Me.), 681.

5. *Local option laws.*] An act provided for an election in the several election districts at which the voters should vote for or against the sale of intoxicating liquors; and that if in any district the vote was against such sale, it should thereafter not be lawful to sell liquor therein. It was provided that the act should take effect immediately after such election. *Held*, that the act was not a delegation of the legislative power to the people, and was valid. *Fell v. The State* (Md.), 83.
6. *License to sell liquor revocable.*] A license to sell liquor under the general license laws of the State is not a contract, and it may be terminated before its expiration by a change or repeal of the law. *Id.*
7. *Tax on liquor—taxation is not “license”—collection of.*] A statute provided for the assessment of a specified tax on liquor dealers, the money thereby raised to be devoted to the use of the towns, villages and cities in which the business was carried on. *Held*, (1) not a “State tax,” and therefore not within the constitutional provision directing the application of “specific State taxes;” (2) that the fact that the same tax was levied on all dealers without regard to the amount of business did not render it unjust or unequal; (3) that the parties taxed could not object because the municipality had no voice in the levy, nor because the sheriff, and not the tax collector, was made the collector, and (4) that the tax was not equivalent to a license so as to come within the constitutional prohibition of licensing the sale of liquors. *Youngblood v. Sexton* (Mich.), 655.
8. *Hawkers and peddlers—“carrying to sell”—police power.*] A statute made it a penal offense to travel from place to place “for the purpose of carrying to sell, or exposing to sale any goods, wares and merchandise” without a license as a broker and peddler. *Held*, (1) that the act was valid; (2) that the act was an exercise of the police power of the State, and therefore not repugnant to the requirement of the Constitution that “the rule of taxation should be uniform;” and (3) that it was not in violation of the Federal Constitution. *Morrill v. State* (Wis.), 12.
9. *Municipal license tax—impairing obligation of contract.*] The city of Mobile made a contract with S., whereby it was agreed that S. should carry on the water-works of the city without “let, molestation or hindrance” from the city, and should have the exclusive privilege of supplying water in the city. *Held*, that a license tax on S., for doing business under such contract, imposed by a city ordinance passed in pursuance of its charter, was invalid, as impairing the obligation of a contract. *Stein v. Mayor* (Ala.), 282.
10. *Railroad companies subject to changes of the general laws—liability for damage from fire.*] A statute provided that all railroad corporations should be liable for damages from fires caused by the operating of such railroad. *Held*, valid and constitutional as to railroads incorporated before the statute was passed. *Rodemacher v. Milwaukee and St. Paul R. R.* (Iowa), 592.

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Making railroad companies liable for expenses of coroners' inquests.] See RAILROADS, 259.

Statute for admission of non-resident attorneys.] See ATTORNEY, 55.

Statute of limitations—vested right under.] See LIMITATION OF ACTIONS, 181.

Statute requiring license to do business.] See LICENSE, 290.

CONTRACT.

Promise—when implied.] In an action to recover the value of one-half of a party wall erected by the plaintiff partly on his estate and partly on that of the defendant, the jury may, in the absence of an express agreement as to payment on the defendant's part, infer a promise to pay, if the plaintiff undertook and completed the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection. *Day v. Caton* (Mass.), 347.

Between mortgagor and mortgages as to insurance.] See INSURANCE, 106.

How affected by custom.] See CUSTOM, 286.

Impairing obligation of.] See CONSTITUTIONAL LAW, 283.

Of service—when sickness no excuse for breach of.] See MASTER AND SERVANT 57.

Of corporations—when ultra vires.] See CORPORATIONS, 504.

Place of performance.] See CONFLICT OF LAW, 589.

To convey land—breach of—damages.] See DAMAGES, 261, 677

To marry.] See MARRIAGE.

When void.] See STATUTE OF FRAUDS, 502.

CONVEYANCE.

See SALE, 143.

CORONER.

Expenses of inquest.] See RAILROAD, 259.

CORPORATION.

1. *Contracts ultra vires.]* Where a corporation has fully performed a contract to manufacture and deliver certain articles and brings an action to recover the price thereof, it is no defense that the contract was *ultra vires*. *Whitney Arms Co. v. Barlow* (N. Y.), 504.

3. *Foreign—service on—substituted service.]* A statute provided that foreign insurance companies, as a prerequisite to doing business in the State, should designate an attorney therein, upon whom process in suits against such companies might be served. *Held*, that the service of a summons on an attorney so designated gave to the court jurisdiction, so as to enable it to render a judgment valid within the territorial limits and enforceable

therein against defendants' property found there. *Gibbs v. Queen Ins. Co.* (N. Y.), 518.

See STOCK, 90.

COUNTY TREASURER.

Liability as to county funds—liability of borrower from treasurer.] A county treasurer is the debtor and not the bailee of the county and therefore if he wrongfully lends money received by him as treasurer and afterward becomes a defaulter, the borrowers are not liable to the county in an action for money had and received. *Semble*, that if such borrower is liable in any form of action it must be on the case, or by bill in equity. *Perley v. County of Muskegon* (Mich.), 638.

COURTS.

Probate courts—surrogates.] Although surrogates' courts are of limited and special jurisdiction which depends upon the existence of certain facts, yet their decision upon the existence of such facts and their consequent jurisdiction is conclusive until regularly reversed or vacated, and will protect all innocent parties acting on the faith of it. *Roderigas v. East River Institute* (N. Y.), 555.

Delegation of judicial functions.] *See* CONSTITUTIONAL LAW, 50

COVENANTS OF TITLE.

1. *Breach of covenant of warranty—eviction—damages.*] In an action by a grantee of land against the grantor for breach of covenants of warranty in the eviction of the grantee by a mortgagee, *held*, (1) that entry of the mortgagee for foreclosure was a sufficient eviction, without actual ouster; and (2) that the measure of damage was the amount of the mortgaged debt and interest if that was less than the full value of the estate. *Furnas v. Durgin* (Mass.), 841.
 2. *Agreement to pay debt of another—action for breach of—damages.*] Land was conveyed "subject to mortgages amounting to \$6,500 which the grantee hereby assumes to pay." The grantee failing to pay one of said mortgages at its maturity, the grantor brought action for a breach of the agreement. *Held*, that the grantor had a right of action without having himself paid the debt or any part thereof, and that he could recover the amount of the mortgage unpaid with interest. *Ib.*, and *note*, 846.
- Breach of—when taxes are incumbrance.*] *See* TAX, 547.

CRIMINAL LAW.

1. *Intent to commit a crime—intent must be proved as laid.*] Upon the trial of an indictment for an assault with intent to commit murder, the defendant cannot be convicted of an assault with an intent to commit manslaughter, but he may be convicted of an assault. *State v. White* (Iowa), 602.
2. *Robbery—intent—compelling payment of debt.*] Defendant, by means of threats of personal violence and menaces, compelled J. S. to pay to him money which defendant believed to be justly due to him from J. S. *Held* not to constitute robbery. *State v. Hollyway* (Iowa), 586.

3. *Larceny — fraudulent taking.*] The prisoner ran away with a horse and carriage, without the owner's knowledge or consent, and with no intention of returning them, and afterward abandoned them in the street. *Held*, larceny. *State v. Davis* (N. J.), 367.
 4. *Arson — setting fire to jail in order to escape.*] A person confined in a jail on a criminal charge, for the purpose of escape set fire to the jail. There was no intention to consume the building, and the fire was controlled by the person setting it in order that it should not do so. *Held*, that such person was guilty of arson. *Luke v. State* (Ala.), 269, and *note*, 271.
 5. *Gambling — billiard-room.*] The keeper of a billiard-room where parties with his knowledge play billiards with the understanding that the loser shall pay for the use of the table, is guilty of a violation of a statute against keeping a house resorted to for the purposes of gambling. *State v. Book* (Iowa), 609.
 6. *Murder — provocation — adultery of wife.*] Where a husband, finding his wife in the act of adultery, strikes her with intent to kill, this is murder; to reduce the offense to the grade of manslaughter the blow must have been given in the heat of passion and without intent to inflict death. *Shufflin v. People* (N. Y.), 483.
 7. *Intoxication as excuse for crime.*] No degree of intoxication will excuse a criminal act, but it is otherwise in respect to mental unsoundness produced by drunkenness and remaining after the intoxication has ceased. *Beasley v. State* (Ala.), 292.
 8. *Indictment — duplicity — arson — charging the burning of several buildings.*] An indictment for arson charged as a single act the burning of several houses. *Held*, to charge but one offense, and therefore not bad for duplicity. *Woodford v. People* (N. Y.), 464.
 9. *When several acts constitute one offense — former conviction.*] The defendant delivered at the same time and by the same act, to the teller of a bank, four forged checks, which purported to have been drawn by four different parties. *Held*, that this constituted but one offense of uttering forged checks, and that a conviction for uttering one of the checks was a bar to a conviction for uttering the others. *State v. Eggesht* (Iowa), 613.
- Amount of evidence required in civil actions involving criminal acts.*] See EVIDENCE, 668; INSURANCE, 409.
- Uncharacter of defendant.*] See EVIDENCE, 825.
- Forgery, what is.*] See FORGERY, 774.
- Stealing dog.*] See LARCENY, 772.
- Right of accused as witness in his own behalf.*] See WITNESS, 688.

CRIMINAL PROCEDURE.

- Appeal abates on death of defendant — effect of death on judgment.*] On an indictment for a felony the prisoner was convicted and sentenced to be imprisoned and to pay the costs of prosecution. He appealed, and pending the appeal died. *Held*, (1) that the appeal was abated; (2) that the judgment for costs remained in force; and (3) that execution might issue thereon against his estate. *Whitley v. Murphy* (Or.), 741

CUSTOM.

Partnership agreement affected by.] It is the custom for those navigating steamboats on the Alabama river to purchase salt at Mobile, to be carried up the river and sold. *Held*, that such custom, in the absence of a contrary stipulation, would affect a partnership agreement made for the purpose of running a steamboat on that river, and the firm would be liable for salt purchased by a partner at Mobile for transportation and sale on the boat. *Waring v. Grady's Executor* (Ala.), 286.

See BROKER, 66.

DAMAGES.

1. *For breach of contract to convey land.*] In an action by a purchaser of land for breach of the contract to convey, *held*, that the measure of damages was the value of the land at the time when the conveyance ought to have been made. *Plummer v. Rigdon* (Ill.), 261.
2. —.] In an action for breach of an agreement to convey land, *held*, that the measure of damage was the value of the land at the time of the breach, less so much of the price as remained unpaid, with interest thereon; and this whether the breach was willful or through defendant's inability to convey; but that the plaintiff had his election to rescind the contract and recover the amount paid, with interest, as money had and received. *Doherty v. Dolan* (Me.), 677.
3. *Measure of, in trespass quare clausum for cutting down and carry away trees.*] In trespass *quare clausum fregit*, and for cutting down and carrying away trees, the measure of damages is the amount of injury which the plaintiff suffered from the whole trespass taken as a continuous act; the increased value of the trees, occasioned by the labor of the defendant in converting them into timber, is not to be included. *Foots v. Merrill* (N. H.), 151.
4. *Measure of, for property destroyed by a mob.*] In an action against a town to recover, under a statute, damages for the destruction of a building by a mob, *held*, that the actual value of the building at the time it was destroyed was the basis of the measure of damage. *Brightman v. Inhabitants of Bristol* (Me.), 711.
5. *In action for injuries by dog — exemplary — evidence of defendant's pecuniary condition.*] In an action to recover damages for injuries occasioned by defendant's dog, *held*, that if the jury find that the defendant was guilty of gross negligence, they may give exemplary damages, and evidence of the defendant's pecuniary circumstances is proper. *Meibus v. Dodge* (Wis.), 6.
6. *To owner of lands taken for a railroad.*] In awarding damages to the owner of lands taken for a railroad, the exposure of his remaining land and buildings to fire from the railroad engines may be taken into consideration, notwithstanding the company is by statute liable for any fire so caused; but the benefits which the owner in common with others derive from the railroad cannot be considered to reduce his damages. *Adden v. White Mountains R. R. Co.* (N. H.), 220.

Against carrier for expulsion from car.] See CARRIER, 222.

Against carrier for loss in transportation.] See CARRIER, 442.

For breach of covenant of warranty.] See COVENANT OF TITLE, 341.

For breach of agreement to pay debt of another.] See COVENANT OF TITLE, 341.

In action for error in telegram.] See TELEGRAPH, 605.

Measure of, for breach of warranty as to vegetable seeds.] See SALE, 425.

Recovery of, against agent for unauthorized acts.] See ACTION, 241.

DECEIT.

By officers of bank.] See NATIONAL BANK, 95.

DEED.

1. *Dower — release of — must be by deed duly acknowledged.]* A wife can only be divested of her dower by a deed properly and legally acknowledged, and a deed not so acknowledged is wholly inoperative as to her, and is to be treated as if she had not been a party to it. *Grove v. Todd* (Md.), 76.

2. *Defective acknowledgment — remedial legislation.]* A wife joined in her husband's deed for the purpose of releasing her dower; but the deed was so defectively acknowledged as to be, under the then existing law, inoperative and void as to her. Afterward, and after the husband had died, the legislature enacted that all deeds having such defects in the acknowledgment should be as valid to all intents and purposes as if regularly acknowledged. *Held*, that the deed was not revived and validated as against the wife; but *semble*, that as against the husband's heirs the deed was made good by the statute. *Ib.*

3. *Registry — notice.]* A deed actually recorded, though not entitled to record, is not constructive notice to a subsequent grantee; but if he has in fact seen the record he is affected with actual notice. *Musgrove v. Bonser* (Or.), 787.

Not operative without delivery.] See NEGOTIABLE INSTRUMENT, 1.

DELIVERY.

Of note or mortgage.] See NEGOTIABLE INSTRUMENT, 1.

DOG.

Not subject of larceny.] See LARCENY, 772.

DOWER.

Two dowers in same estate — conveyance in fee to dowress — estoppel — merger.]

A widow entitled to dower in lands accepted from the heir a conveyance in fee of the land with warranty, and entered into possession. The heir dying, his widow brought action of dower against the first widow. *Held*. (1) that the second widow was dowable only out of two-thirds of the lands; (2) that the first widow was not estopped to claim dower by the covenants of warranty in the deed to her; and (3) that, being in possession and in the same condition as if dower had been assigned, her dower was not merged by the conveyance. *McLeery v. McLeery* (Me.), 683.

Release of.] See DEED, 76.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 688, 681.

ELECTION LAW.

1. *Register of voters—liability of.*] A board of registration of voters were required by statute to erase from the list of registered voters the name of any person proved on a hearing, had after notice to him, to be disqualified. *Held*, that the board, in performing this duty, acted judicially, and that a voter could maintain no action against them for wrongfully erasing his name, without showing that they failed to give him the notice required by law. *Fausler v. Parsons* (W. Va.), 481.
 2. *Bribery—offering to give salary to county—pleading.*] In an action in the nature of *quo warranto* to declare void the election of a county officer on the ground that he offered, before election, to pay a part of his salary into the county treasury if he should be chosen, *held*, that the complaint was bad for not showing that voters influenced by such offer were tax payers of the county, or would otherwise be benefited by the performance of the promise. *State v. Church* (Or.), 746.
- Indictment for illegal voting—when sustained after verdict.*] *See* INDICTMENT 734.

EQUITY.

When, will order instrument canceled.] *See* MUNICIPAL BONDS, 495.

ESTOPPEL.

Of maker of note to show that it was made on Sunday.] *See* SUNDAY, 26

Of legatee to contest will.] *See* WILL, 138.

See DOWER, 688; HUSBAND AND WIFE, 282.

EVICITION.

What amounts to.] *See* COVENANT OF TITLE, 841.

EVIDENCE.

1. *Amount required in civil actions involving criminal acts.*] In an action for an assault and battery with attempt to ravish, *held*, that plaintiff was not required to prove the charge beyond a reasonable doubt; a preponderance of evidence was sufficient. (*See ante*, 409.) *Elliott v. Van Buren* (Mich.), 668.
2. —.] On the trial of a civil action wherein the claim or defense is based on an alleged fraud, the issue may be determined in accordance with the preponderance or weight of evidence, whether the facts constituting the alleged fraud do or do not amount to an indictable offense. (*See ante*, 409.) *Jones v. Greaves* (Ohio), 752.
3. *Of reputation on criminal trial.*] Upon the trial of an indictment the defendant introduced evidence tending to show that his general reputation was good. *Held*, that the prosecution could not, in reply, put in evidence of particular facts. *Commonwealth v. O'Brien* (Mass.), 825. and *note*, 825.

Amount of, in civil action to establish facts constituting crime.] See INSURANCE, 409.

Affidavits of jurors.] See VERDICT, 544.

In action to recover the value of property destroyed by a mob.] See NUISANCE, 711.

Of defendant's pecuniary circumstances in action for negligence.] See ANIMALS, 6.

Of statements as to health.] See INSURANCE, 533.

Right of accused as witness in his own behalf.] See WITNESS, 688.

To impeach statutes.] See STATUTES, 69.

EXECUTION.

Exemption of property from sale on.] See PARTNERSHIP, 60, 763.

Against town — property of inhabitants cannot be taken.] See MUNICIPAL CORPORATION, 297.

EXEMPTION.

Of property from sale on execution.] See PARTNERSHIP, 60, 763.

Of money insured on exempt property.] See ATTACHMENT, 128.

Sale of exempt property when fraudulent as to creditors.] See SALE, 143.

EXPRESS COMPANY

See CARRIER.

FALSE REPRESENTATIONS.

By officer of bank acting ultra vires.] See NATIONAL BANK, 85.

FIRE INSURANCE.

See INSURANCE.

FIRE LIMITS.

See MUNICIPAL CORPORATIONS, 671.

FIXTURE.

Right to remove, after term.] A landlord agreed to sell a trade fixture for the tenant's benefit, and the tenant left it after the expiration of his term. The landlord failed to sell it. *Held*, that the tenant had a reasonable time after the term to remove it, and that his creditors had the same right by attachment. *Torrey v. Burnett* (N. J.), 421.

FORMER CONVICTION.

See CRIMINAL LAW, 612.

FORGERY.

What is.] Where A, for the purpose of defrauding B, procured C, an innocent party, to sign the name of B to a promissory note, by falsely representing that C was authorized by B so to do — *held*, that A was guilty of forgery. *Gregory v. State* (Ohio), 774.

Using forged paper.] *See* CRIMINAL LAW, 612.

FRAUDULENT CONVEYANCE

See SALE, 142.

GAMBLING.

See CRIMINAL LAW, 609.

HAWKERS AND PEDDLERS.

See CONSTITUTIONAL LAW, 12.

HIGHWAY.

1. *Liability of town for defective private bridge not in limits of highway — duty of town to warn travelers of defect.*] Plaintiff was injured while crossing a bridge over a stream in defendant's town, but which bridge was built by private individuals for their own convenience, and was not within the limit of the highway. The means of crossing the stream on the adjacent highway were difficult, and the main travel crossed the bridge. The statute made towns liable for injuries happening by reason of the insufficiency or want of repair of any highway or bridge therein. *Held*, (1) that the town was not bound to keep the bridge in repair, and (2) that the bridge not being within the limits of the highway the town was not bound to warn travelers of its dangerous condition. *Green v. Town of Bridge Creek* (Wis.), 18.
2. *Liability of town to adjoining land-owner.*] In an action by the owner of land adjoining a highway against the town, the declaration alleged that the defendant negligently permitted the highway and drains to get out of repair, so that the water which ought to have gone through the drains overflowed plaintiff's land to his damage. *Held*, that the declaration stated a cause of action. *Gilman v. Laconia* (N. H.), 175.
3. *Obstruction in — when town liable for injuries occasioned by.*] Plaintiff's horse became frightened by a rock lying in defendant's highway in a situation calculated to frighten horses, and plaintiff in attempting to dismount was injured. *Held*, that if the horse was unmanageable, and plaintiff was dismounting to avoid danger, defendant was liable, but that if the horse was manageable, and plaintiff dismounted to avoid apprehended difficulty, the defendant was not liable. *Held*, also, that the defendant was liable for an injury occurring from the fright of the horse at the rock, although neither the horse nor the carriage came into contact with the rock, the horse being ordinarily safe and gentle. *Card v. City of Ellsworth* (Me.), 722.

Injury from defect in.] *See* SUNDAY, 673.

Projecting snow and ice into.] *See* NUISANCE, 164.

Traveling on wrong side of — negligence.] *See* ACTION, 3'5.

HOMESTEAD.

Right to, not assignable.] *See* SALE, 142.

HUSBAND AND WIFE.

1. *Estoppel — grantor of land without title.*] A husband and wife conveyed land, as the husband's land, in which neither had any interest. *Held*, that the wife was not estopped from setting up against the grantee a title to such land thereafter acquired by her. *Gonsales v. Hukil* (Ala.), 282.
 2. *Paraphernalia of wife — action for injury to.*] A married woman cannot maintain an action against a carrier for loss of personal apparel furnished to her by her husband, or purchased by her with moneys given to her by him from a fund formed by their joint earnings. *Hawkins v. Providence, etc., R. R. Co.* (Mass.), 353.
 3. *Action by wife for personal injuries — concurrent right of action by husband.*] By statute a married woman was alone authorized to bring action for an injury to her person. *Held*, that the husband had also a right of action for consequential injury to himself resulting from an injury to his wife in being deprived thereby of her labor and service. *Manhirst v. Hatten* (Iowa), 618.
- Wife not "relation" of husband.*] *See WILL*, 30.
- Release of dower.*] *See DEED*, 76; *DOWER*, 688.

ILLEGAL CONTRACT.

Mortgage to compound felony.] Defendant's son having been guilty of the crime of embezzlement, defendant executed a mortgage in settlement of the amount embezzled in consideration of an agreement that the son should not be prosecuted. *Held*, that the consideration was illegal and the mortgage void. *Peed v. McKee* (Iowa), 681. (*See ante*, p. 286.)

INDICTMENT.

For illegal voting — when sustained after verdict.] Defendant was indicted for that he "did willfully, knowingly and unlawfully vote" at an election in a certain precinct, "having no lawful right to vote at said precinct," and "well knowing himself not entitled by law to vote thereat." *Held*, good after verdict; but that it would have been bad on demurrer for not showing the reason of the disqualification. *State v. Bruce* (Or.), 784.

For arson.] *See CRIMINAL LAW*, 464.

INDORSEMENT.

- *What implied by.*] *See NEGOTIABLE INSTRUMENTS*, 438.

INFANT.

1. *Necessaries — attorneys' fees.*] An infant is liable as for necessaries, for services of an attorney rendered in defending him in a bastardy proceeding. *Barker v. Hubbard* (N. H.), 160.
2. *Liability of father for necessaries.*] No action can be maintained against a father for goods purchased on his credit by a minor child, even for necessaries, unless the father has expressly or impliedly authorized the purchase on his credit. *Freeman v. Robinson* (N. J.), 899, and *note*, 403.

3. —.] The mere moral obligation of a parent to maintain his child affords no legal inference of a promise to pay a debt contracted by the latter even for necessities. *Ib.*
 4. *Consideration.*] A mere moral obligation or duty as an executed consideration is not a sufficient consideration to support a subsequent express promise. *Ib.*
 5. —.] Goods having been sold to a minor child of the defendant, on his credit, without his knowledge or consent, *held*, that a subsequent promise by the defendant to pay was invalid for want of a legal consideration. *Ib.*
- Negligence of parents.*] See NEGLIGENCE, 510.

INJUNCTION.

To restrain transfer of bonds.] See MUNICIPAL BONDS, 495.

INSANITY.

Produced by intoxication, as a defense.] See CRIMINAL LAW, 292.

Acquittal on ground of — confinement of defendant.] See CONSTITUTIONAL LAW, 633.

INSURANCE.

FIRE.

1. *Condition avoiding policy for non-payment of premium note — waiver of.*¹
A policy of insurance contained the condition that "whenever a promissory note shall be taken for the cash premium, the policy in all such cases shall be issued upon the express condition that if said note is not paid within sixty days after the same shall become due, thereafter all obligations of the company to the insured shall be suspended until such time as the said note shall be fully paid." A loss occurred while a note given for a portion of the cash premium remained unpaid for more than sixty days after due. *Held*, (1) that the condition was valid, but (2) that it was waived by defendant's accepting, after notice of loss, the amount due on the note. *Joliffe v. Madison Mutual Ins. Co. (Wis.)*, 35.
2. *Recovery by mortgagor of amount paid to mortgagees.*] Defendant conveyed to plaintiff certain premises, and took back a mortgage for a part of the purchase-money. At the time of the conveyance defendant had a policy of insurance on the premises, and notified the company of the sale and of the mortgage to him, and the insurance was continued to him under the same policy, in the same manner and for the same amount. The premises were burned, and the defendant promised the plaintiff that if he got the amount of the insurance he would give it to him, or allow it on the mortgage. The insurers paid the insurance money. Afterward at the maturity of the mortgage plaintiff paid the full amount of it and demanded the amount of the insurance received. *Held*, that the defendant was liable in equity to the plaintiff for the money received, and that such liability was a sufficient consideration for defendant's promise to pay it over or apply it, and that an action lay on such promise. *Callahan v. Linthicum (Md.)*, 106.

2. *Condition against double insurance.*] The plaintiff, having a valid insurance in one company conditioned to be void if the assured should have existing, during the existence of such policy, any other contract of insurance, whether valid or not, obtained a policy from the defendants upon part of the same property, which was also conditioned against double insurance. *Held*, (1) that the first policy did not terminate instantly upon the execution of the second so as to save the condition in the second, and that there was a double insurance within the terms of the second policy; and (2) *semble* that the condition in the first policy, making it void in case of an "invalid" contract of insurance, was void. *Gee v. Cheshire County Ins. Co.* (N. H.), 171.
4. *Double insurance — when policy not avoided by.*] A policy of insurance, conditioned to be void in case of other insurance without the consent of the company, is not avoided by the taking of a subsequent invalid policy, *i. e.*, which is invalid by reason of the non-compliance with a condition against the existence of any other insurance without the consent of the insurer; and the assured may set up the invalidity of the second policy in an action by him upon the first policy, although he has received payment of the second policy from the insurer. *Thomas v. Builders' Fire Ins. Co.* (Mass.), 817, and *note*, 819.
5. *Subsequent insurance by void policy.*] Plaintiff, having a policy of insurance in defendant's company conditioned to be void in case of subsequent insurance without notice, obtained further insurance without notice in another company on the same and other property, but the second policy was void because of a condition therein against other insurance. A loss having occurred, plaintiff accepted from the second company a sum in compromise of his claim against them. *Held*, that he was not estopped to show that the second policy was void, and that in so showing he could recover on the first. *Lindley v. Union Ins. Co.* (Me.), 701.
6. *Double or additional insurance.*] Where a policy of insurance contains a condition of avoidance on account of additional or over-insurance, such policy is not avoided by contract for additional insurance, where it is shown that such contract is invalid as to all excessive insurance. *Knight v. Eureka Ins. Co.* (Ohio), 778.
7. *Action on policy — who may bring.*] On a policy of insurance against loss by fire, under seal, issued to the owner of the property, in which the insurer covenants to make good unto the insured, his executors, administrators, or assigns, all such damage or loss as might happen, etc., the owner may sue in his own name, although it may be written on the face of the policy, "Loss, if any, payable to A. B., as mortgagee." *Martin v. Franklin Fire Ins. Co.* (N. J.), 872.
8. *Appointment of payment.*] The direction on the policy to pay to the mortgagee is not an assignment of the policy. Its legal effect is that of a direction, in advance, as to the mode of payment, which, when made, is performance in the manner agreed to by the insured. *Id.*
9. —.] Under such a direction, if assented to by the insurer, the person in whose favor the appointment is made acquires equitable rights, which the

- insurer is bound to regard, but the contract with the insured is not thereby merged or extinguished. *Ib.*
10. *Where insurer has paid to mortgagee.*] In an action on such a policy, in the name of the insured, if the insurer has paid the insurance money to the mortgagee, he may plead such payment as performance, and the rights of the mortgagee can be protected, and the insurer obtain indemnity against a subsequent suit by the mortgagee by the payment of the money into court. *Ib.*
 11. *Defense of willful burning — amount of proof.*] To an action on a policy of insurance, the defense was interposed that the plaintiff willfully set fire to the insured property. *Held*, that the defendant was bound to establish the defense beyond a reasonable doubt, and by the same measure of proof that would be required to convict the plaintiff if tried on an indictment charging that offense. *Kane v. Hibernia Mutual Fire Ins. Co.* (N. J.), 409, and *note*, 420.
 12. *Alienation — decree in foreclosure.*] A policy of insurance conditioned to be void in case of alienation of the property, declared that "a judgment in foreclosure proceedings" should be deemed an alienation. *Held*, that a decree in a foreclosure suit, without further proceedings, was not an alienation. *Ib.*
 13. *Insurable interest.*] A married woman, being indebted to her husband, gave him a written acknowledgment of the debt "which shall be a lien on my property," and afterward died leaving insufficient personal assets to pay her debts and but one parcel of land, valuable chiefly for the buildings on it. *Held*, that the husband had an insurable interest in the buildings. *Rohrbach v. Germania Fire Ins. Co.* (N. Y.), 451.
 14. *Description of property.*] A policy insured plaintiff "on his two buildings." He did not own the buildings, but had an interest in them and was in possession of them. *Held*, not a warranty of ownership, nor a material misrepresentation. *Ib.*
 15. *Statement as to interest.*] A policy of insurance provided that if the interest of the assured in the property was other than the entire, unconditional ownership, it must be so represented to the company and so expressed in the policy. To the question in the application, "Is your title to the property absolute?" the assured answered, "His deceased wife held the deed." The assured had only an equitable interest in the property and possession. *Held*, not such a full and true statement of the facts as the condition required, and that the policy was void. *Ib.*
 16. *When company not bound by knowledge of agent.*] A policy of insurance provided that the agent taking the application should be the agent of the applicant and not of the company under any circumstances whatever. *Held*, that the company would not be bound by the knowledge of the agent acquired when the application was made. *Ib.*
 17. *Alienation — sale by one partner to the firm.*] Plaintiff, being the owner of goods which were insured by a policy conditioned to be void in case of alienation, sold the goods to a firm of which he was a member. *Held*,

that this was not such an alienation as would avoid the policy. *Owen v. Iowa State Ins. Co.* (Iowa), 583.

LIFE.

18. *Evidence of prior statements as to health.*] In an action by a wife to recover the amount of an insurance policy, issued to her upon the life of her husband, *held*, that evidence of the declarations of the husband made to third persons prior to the insurance, when speaking of an existing disease, was competent upon the question as to the truthfulness of statements made in the application. *Swift v. Massachusetts Mutual Life Ins. Co.* (N. Y.), 522.

MARINE.

19. *Constructive loss — abandonment.*] In an action on a policy of marine insurance it appeared that the insured vessel, being jammed fast in the ice in the Arctic Ocean with no open water in sight and drifting northward with the current, her officers and crew finding it impossible to extricate her, left her and took to the boats and succeeded after three days in reaching the whaling fleet fifty miles south. Ten days afterward, by a change of wind and current, the ice loosened and the vessel was brought out by the master and crew of another vessel and held by them for salvage; but the master of the insured vessel, whose crew had become scattered in other vessels and some of whom had started homeward, was unable to obtain a sufficient crew or to regain possession of the vessel so as to pursue the voyage in which she was employed and for which she was insured, and she was brought by the salvors to San Francisco, and before her arrival at that port abandoned by her owners to the underwriters. *Held*, a constructive total loss and that the abandonment was good. *Snow v. Union Ins. Co.* (Mass.), 849.
20. *"For benefit of whom it may concern" — who may recover on policy.*] The part owner of a vessel mortgaged his share and then procured an insurance on the vessel "for the benefit of whom it may concern;" a loss occurring and the part owner being dead, *held*, (1) that his administratrix could recover the entire amount in an action on the policy, and (2) that payment of the judgment in her favor by the underwriters was a bar to a suit by the mortgagee. *Sleeper v. Union Ins. Co.* (Me.), 706.
21. *Insurance by part owner.*] A part owner of a vessel, in whose name a policy of insurance on the whole vessel, for account of the owners, is issued, becomes a trustee for all the owners, and, in case of loss, may sue on the policy in his own name alone. *Knight v. Eureka Marine Ins. Co.* (Ohio.), 778.
22. —.] A part owner of a vessel has no authority, by reason of the joint ownership, to insure the interests of the other owners; hence, a policy taken upon the whole vessel in his own name, without previous authority or subsequent ratification by the other owners, is invalid, except as to the interest of the part owner obtaining it. *Ib.*
23. —.] Where such policy was intended by the insurer to cover the whole vessel for the benefit of all concerned, but is invalid, except as to

the interest of the part owner procuring it, the insurer is only liable to such part owner for such a portion of the sum insured as his interest bears to the whole. *Ib.*

Attachment of insurance money.] See ATTACHMENT, 128.

Premium note memorandum as to payment.] See NEGOTIABLE INSTRUMENT, 89.

INTENT.

See CRIMINAL LAW.

INTEREST.

Interest on interest.] Under a contract for the payment of interest at a specified rate annually, upon default of payment, interest on the interest will be computed at six per cent. Cramer v. Lepper (Ohio), 758.

See NATIONAL BANK, 759; USURY.

INTOXICATION.

As excuse for crime.] See CRIMINAL LAW, 292.

JUDGE.

Statute authorising counselors to act as.] See CONSTITUTIONAL LAW, 50.

JUDGMENT.

1. *Action on judgment of another State.] In an action of replevin in Tennessee the defendant had judgment as authorized by the law of that State for a return of the goods or, failing that, that he recover of the plaintiff and his surety in the replevin bond the value of the goods. Held, that an action of debt on this judgment, against the plaintiff and the surety, was not maintainable in Maryland. Thorner v. Batory (Md.), 74.*

2. *Service by attachment—effect of judgment.] A judgment against a non-resident where jurisdiction is based only on an attachment of property, without personal service, is but a judgment in rem, good only against the particular property attached, and cannot be made the basis of an action of debt, in order to obtain satisfaction out of other property of defendant. Eastman v. Wadleigh (Me.), 695.*

On note payable in specie.] See NEGOTIABLE INSTRUMENTS, 272.

JURISDICTION.

Of surrogates' courts.] See COURTS, 555.

Service on foreign corporation.] See CORPORATION, 518.

JURY.

Affidavits of, admissible to correct verdict.] See VERDICT, 544.

Trial by—compulsory reference.] See CONSTITUTIONAL LAW, 194.

LANDLORD AND TENANT.

Lease of part of building—liability of landlord for negligence.] Defendants, the owners of a building, leased the lower story thereof to the plaintiff,

but occupied the upper story themselves. They employed a carpenter to put a skylight in the roof, which he did so negligently that the rain came through and damaged plaintiff's goods. *Held*, that the defendants were liable therefor. *Glickauf v. Maurer* (Ill.), 288, and *note*, 240.

Liability of landlord for injury to third person by reason of defective premises.
See NEGLIGENCE, 768.

See FIXTURES.

LARCENY.

Dog not subject of. Under the criminal law of Ohio, a dog is not the subject of larceny, and therefore an indictment charging that the defendant broke and entered a stable in the night season, with intent to steal a dog, is not a good indictment for burglary. *State v. Lynus* (Ohio), 772.

Fraudulent taking. *See CRIMINAL LAW*, 367.

LATERAL SUPPORT.

Of land adjoining street. *See MUNICIPAL CORPORATION*, 242.

LAWYER.

See ATTORNEY, 42.

LEGISLATURE.

Validity of acts of. *See CONSTITUTIONAL LAW ; STATUTES.*

LEGATEE.

See WILL.

LICENSE.

Statutes requiring, constitutional. A statute of Alabama provided that every person engaged in a profession should take out and pay a specific sum for a license, and the doing of professional business without a license was declared a misdemeanor, and punishable as such. *Held*, that the statute applied to lawyers, and was constitutional. *Cousins v. State* (Ala.), 290.

To sell liquors, revocable. *See CONSTITUTIONAL LAW*, 83.

To enter and remove timber. *See SALE*, 119.

LIEN.

On personal property—when mortgagor cannot create, as against mortgagee—agistment. The statute provided that any person to whom cattle were intrusted to be pastured should have a lien thereon for their keep. *Held*, that an agister to whom cattle had been intrusted by the mortgagor of them, without the knowledge or consent of the mortgagee, had no lien on them as against the latter. *Sargent v. Usher* (N. H.), 208.

Of attorney—by what law governed. *See ATTORNEY*, 134.

LIMITATION OF ACTIONS.

Statute of—vested right under. When the statute of limitation has run on a debt, the debtor's right to the defense is vested, and any statute which

afterward annuls or takes it away is unconstitutional. *Rockport v. Walden* (N. H.), 131.

Payment by one partner after dissolution.] See PARTNERSHIP, 362.

LIQUOR.

License to sell.] See CONSTITUTIONAL LAW, 53.

LIS PENDENS.

See ACTION, 63.

LOCAL IMPROVEMENTS.

See ASSESSMENTS.

LOCAL OPTION LAWS.

See CONSTITUTIONAL LAW, 82.

LORD'S DAY.

See SUNDAY.

MARINE INSURANCE.

See INSURANCE.

MARITIME LAW.

See SHIPPING, 713.

MARRIAGE.

Promise to marry — when against public policy.] An agreement of a married man to marry when a divorce should be decreed between himself and his wife in a suit then pending, is contrary to public policy, and void. *Noice v. Brown* (N. J.), 388.

MARRIED WOMAN.

Injury to — action for.] See HUSBAND AND WIFE, 613.

Release of dower.] See DOWER, 76, 683.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. *Contract for service — when sickness no excuse for breach of.*] Plaintiff agreed that he and his wife would work for defendant for a year for a gross sum. Four months after the wife, being about to give birth to a child, left, and the plaintiff was thereupon discharged. In an action to recover wages on the *quantum meruit*, held, that plaintiff should have foreseen and provided for his wife's sickness when he made the contract, and that, therefore, his non-performance was not excused, and he could not recover. *Jennings v. Lyons* (Wis.), 57.
2. *Liability of master for acts of servant.*] Defendant's street car was stopped so as to obstruct the street; plaintiff, a foot-passenger, wishing to cross the street, stepped upon the platform of the car in order to do so, and was

thrown off by the driver and hurt. On demurrer to a complaint alleging these facts, and that the driver acted "forcibly, willfully and violently," and was the "servant and agent" of the defendants, *held*, that the demurrer was properly overruled. *Shea v. Sixth Avenue R. R. Co.* (N. Y.), 480.

- 8 *Master and servant — injury to servant.*] A conductor on defendant's rail road was knocked from a freight train and killed by a projecting roof of defendant's depot. He was familiar with the road, had passed over it daily for a long time, and the roof had not been altered after he entered the defendant's employ. *Held*, that the company was not liable. *Gibson v. Erie Ry. Co.* (N. Y.), 552.

Injury to servant.] See NEGLIGENCE, 381.

MEASURE OF DAMAGES

See DAMAGES.

MERGER.

See DOWER, 688.

MISNOMER.

Christian name — initial letter — return of sheriff — when not conclusive.] The name of defendant in a writ of attachment was Henry F. Hawkins, but the sheriff testified to the register that he had attached the property of Henry M. Hawkins. *Held*, such a misdescription as to render the attachment void, and that the sheriff's return that he had duly certified the attachment to the register according to law might be contradicted by producing the certificate. *Dutton v. Simmons* (Me.), 729.

MISTRIAL.

See CONSTITUTIONAL LAW, 50.

MORTGAGE.

Delivery of.] See DELIVERY, 1.

Given to secure note.] See NEGOTIABLE INSTRUMENTS, 687.

Insurance — payment of policy to mortgages.] See INSURANCE, 872.

Mortgagor cannot create lien as against mortgages.] See LIEN, 208.

Recovery by mortgagor of insurance paid to mortgages.] See INSURANCE, 106.

Who may set up defense of usury in.] See USURY, 756.

See COVENANT OF TITLE, 341.

MUNICIPAL BONDS.

Equity — when the cancellation of a written instrument will be decreed. Injunction — restraining transfer of instrument.] Certain town bonds, irregularly issued, were held by the State courts to be void even in the hands of *bona fide* holders; but the United States courts held otherwise. The town brought an action to have said bonds delivered up and canceled, and to enjoin the holders of them from transferring them to *bona fide* holders

who might sue in the United States courts. *Held*, (1) that the court would not direct the bonds to be canceled, no special ground for equitable relief being shown, and (2) that the court could not restrain the transfer, at least in the absence of proof that the defendants were not themselves *bona fide* holders. *Town of Venice v. Woodruff* (N. Y.), 495.

MUNICIPAL CORPORATION.

1. *Lateral support of land adjoining street—liability for changing grade of street.*] Municipal corporations, while acting within the scope of their municipal authority in making excavations in streets for the purpose of opening and improving them, are not liable to the owners of abutting property for injuries to buildings erected thereon, resulting from the removal of the lateral support of the soil. *City of Quincy v. Jones* (Ill.), 248.
2. *Prescriptive right to lateral support.*] The owner of property adjoining a street can acquire no prescriptive right as against the municipal corporation, to the lateral support of the soil of the street. *Ib.* and *note*, 251.
3. *Liability of, for insufficient culvert.*] In an action against a city to recover damages for injuries occasioned to plaintiff's property by reason of an insufficient culvert, *held*, (1) that the city's liability was not altered by the fact that the culvert had been paid for by the county; (2) that the city was not liable if it employed a competent engineer to construct the culvert even though he misjudged as to the capacity required; (3) that the city was bound to exercise reasonable care, judgment and skill in the construction of the culvert; and (4) that if plaintiff could have protected his property at slight expense he could not recover beyond what such protection would have cost. *Van Pelt v. City of Davenport* (Iowa), 622, and *note*, 626.
4. *Private property cannot be taken on execution again.*] The private property of the inhabitant of an incorporated town is not liable to seizure upon an execution against the town. *Miller v. McWilliams* (Ala.), 297.
5. *Right of, to indemnify officers.*] A town may, out of moneys raised for town purposes, indemnify its officers for reasonable expenses incurred by them in or through the *bona fide* discharge of their duties. *State v. Council* (N. J.), 404.
6. *Officers—right to recover for services outside of their official duties.*] The mayor of a city, who was a lawyer by profession, was, without collusion or fraud, employed under a resolution of the common council to appear for the city and defend a suit against it. *Held*, that the employment was valid, and that he could recover the value of his services. *Mayor of Niles v. Muzzy* (Mich.), 670.
7. *Liability of, for acts of officer.*] Where a municipal corporation elects or appoints an officer in obedience to a statute, to perform a public service, in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as a servant or agent of the municipality, for whose negligence or want of skill it can be held liable. *Mumillian v. Mayor* (N. Y.), 468, and *note*, 474.

8. —.] A statute created a Department of Charities in the city of New York, to have charge of the alms houses, and the care of paupers, destitute children, lunatics, etc., the officers of which were to be appointed by the mayor. *Held*, that the duties of the department were public in their character, and not municipal, and that the officers and their employees were not servants of the city in such sense as to make it liable for their negligence while using its property in the discharge of their duties *Id.*
9. *Negligence of agents — spread of contagious disease.*] The selectmen of a town, in the performance of a duty imposed upon them by statute, employed a person as nurse in a small-pox hospital established by the town, and suffered him to depart without being properly disinfected, whereby plaintiff caught the disease. *Held*, that the town was not liable. *Brown v. Inhabitants of Vinalhaven (Me.)*, 709.
10. *Fire limits — erection within — equity will not restrain.*] A court of equity has no jurisdiction to restrain the erection of a wooden building within the fire limits of a municipal corporation, although such erection is prohibited by ordinance. *Village of St. Johns v. McFarlan (Mich.)*, 671
- Liability for non-repairs of highways.*] See HIGHWAY, 175, 722.
- License tax, constitutionality of.*] See CONSTITUTIONAL LAW, 362.
- Removal of officer, remedy for.*] See OFFICER, 237.
- Treasurer of — relation of.*] See COUNTY TREASURER, 638.

MURDER.

See CRIMINAL LAW.

NAMES.

See MISNOMER, 729.

NATIONAL BANK.

1. *Ultra vires — when not liable for representations of officer.*] Selling rail road bonds upon commission is not within the scope of the corporate powers of a national bank; and, therefore, no action lies against such corporation for false representations made by its teller to induce the plaintiff to buy bonds. *Weckler v. First National Bank (Md.)*, 95.
2. *Usury by — liability relating to.*] The knowingly taking or receiving by a national bank of a rate of interest greater than is allowed by law upon a loan of money does not entitle the person paying the same to have it applied as a payment of so much of the principal, in an action brought to recover the principal debt more than two years after such payment was made. The rights and liabilities of the parties in such case are prescribed in the national bank act, and cannot be controlled by State legislation. *Higley v. First National Bank (Ohio)*, 759.

NATURALIZATION.

1. *Evidence to impeach record of.*] Parol evidence is not admissible to impeach the record of naturalization by showing that the preliminary steps were not taken. *People ex rel. Brackett v. McGowan (Ill.)*, 254.

2. *Jurisdiction.*] A court of record having common-law jurisdiction of a certain class of cases and a seal and a clerk, has "common-law jurisdiction," and can admit aliens to citizenship under the act of Congress. *Ib.*

NECESSARIES.

When infant liable for attorneys' fees.] See INFANT, 160.

Liability of father for necessities furnished infant.] See INFANT, 899.

NEGLIGENCE.

1. *Liability of railroad for defect in cars — master and servant — injury to servant.*] In an action by the servant of a railroad company against the company for an injury sustained by means of a car's being thrown from the track by the breaking of a switch, the declaration alleged that the injury was caused by the defendant's negligence, 1st, in not having a proper switch at the place, and 2d, in the imperfection of its cars by the want of proper check-chains. *Held*, (1) that the company was not responsible for hidden defects not discoverable by the most careful inspection; and (2) it appearing that plaintiff knew that some of the defendant's cars had no check-chains and were, therefore, not safe, that he assumed the risk incident thereto, although he had not prior to the accident noticed the absence of them from the particular car. *Ladd v. New Bedford R. R. Co.* (Mass.), 381, and *note*, 383.
2. *When assignee in bankruptcy of railroad not liable for injuries occasioned in operating.*] The assignee in bankruptcy of a railroad corporation, who operates the road under the order of the court, is not personally liable for an injury caused by the negligence of a servant employed by him, in the absence of evidence that he was negligent in the selection of servants or that he held himself out as operating the road otherwise than as receiver. *Cardot v. Barney* (N. Y.), 533, and *note*, 540.
3. *Contributory, of child — negligence of parents.*] In an action to recover damages for injuries to a child *non sui juris*, occasioned by the negligence of the defendant, *held*, that negligence upon the part of the parents is no defense where it appears that the child had not committed or omitted any act which would constitute contributory negligence in a person of years of discretion. Negligence can only be imputed to the child through the parents, but when the child has done no negligent act, the conduct of the parents is immaterial. *McGary v. Loomis* (N. Y.), 510, and *note*, 512.
4. *Contributory — injury to animals — fence.*] Plaintiff's horse escaped from his own land on to defendant's railroad and was killed by a locomotive. *Held*, that the plaintiff was not guilty of contributory negligence in turning the horse upon his land knowing that it was not fenced, when it was the legal duty of the railroad company to build the fence. *Wilder v. Maine Central R. R. Co.* (Me.), 698.
5. *Liability of landlord to third party for injury from defect in leased premises.*] The defendant, being the owner of a lot of ground, erected thereon a storehouse, and afterward leased the store-room and agreed with the lessee to construct therein cornices, shelvings and fixtures, in a secure,

NUISANCE.

1. *Constructing roof so as to project snow and ice into highway.*] Declaration that defendant's building abutting a highway was so constructed that the snow and ice may accumulate upon the roof and thence fall into the street, and that it did so fall and injure the plaintiff, *held*, defective in not charging defendant with negligence. *Garland v. Towne* (N. H.), 164.
2. *Explosion of steam-boiler — liability of owner.*] The owner of a steam-boiler, which he has in use on his own property, is not responsible, in the absence of negligence, for the damages done by its bursting. *Marshall v. Wellwood* (N. J.), 394.
3. *Brickburning — prescription.*] Plaintiff's lands surrounding his premises were planted with ornamental shade and fruit trees and shrubbery. On adjoining land the defendant owned and operated a brick-kiln, wherein he manufactured brick by the use of anthracite coal, thereby producing a noxious vapor, which the wind carried upon plaintiff's lands, and which injured and destroyed his trees and shrubbery. Defendant's premises had been in use as a brick-yard, though not uninterruptedly, since before the plaintiff purchased his lands, and for more than twenty-five years. *Held*, (1) that the plaintiff was entitled to an injunction to restrain the defendant from using such coal as would produce the noxious vapor; (2) that plaintiff was entitled to damages; (3) that plaintiff's right was not affected by the fact of the prior occupation by defendant, and (4) that defendant had not acquired a prescriptive right, as the kiln had not been used uninterruptedly for twenty years. *Campbell v. Seaman* (N. Y.), 567, and *note*, 580.
4. *Abatement of.*] When a nuisance consists in the use to which a building is put, and not in its location, the abatement must consist only in putting a stop to such use. *Brightman v. Inhabitants of Bristol* (Me.), 711.
5. *Destruction of buildings by mob — evidence — damages.*] In an action against a town, under a statute, to recover damages for the destruction of a building by a mob, *held*, (1) that evidence that the business carried on in the building was, from its noisome smells, a public nuisance, was inadmissible (the business not being of itself unlawful) to justify the destruction or as tending to show contributory negligence on the part of the plaintiff; (2) that the actual value of the property at the time it was destroyed was the basis of the measure of damage. *Id*

OFFICER.

1. *Remedy of, for unlawful removal.*] A city officer cannot maintain a bill in equity to enjoin the corporate authorities from unlawfully removing him or appointing a successor, as he has a complete remedy at law. *Delahanty v. Warner* (Ill.), 287.
2. *Officer de facto — who is — acts of.*] Service of a legal notice was made by a person whose term of office as a constable had expired, but who was generally supposed to be a constable, and at the time was notoriously acting as such. *Held*, that he was an officer *de facto*, and that the validity of the service could not be collaterally called in question. *Peterson v. Stone* (Mass.), 335.

Bond of—liability of sureties.] See SURETY, 303.

De facto—when one exercising judicial functions is not.] See CONSTITUTIONAL LAW, 50.

Liability for acts of.] See MUNICIPAL CORPORATIONS, 468.

Of municipal corporations, indemnity to.] See MUNICIPAL CORPORATIONS, 404.

Municipal—extra compensation of.] See MUNICIPAL CORPORATIONS, 670.

Trespass by, in execution of process—when party not liable for.] See TRESPASS, 519.

See COUNTY TREASURER, 683.

PARAPHERNALIA.

Action for injury to.] See HUSBAND AND WIFE, 353.

PARENT AND CHILD.

See INFANT; NEGLIGENCE, 510.

PAROL EVIDENCE.

See EVIDENCE.

PARTIES.

See ACTION.

PARTNERSHIP.

1. *Exemption—partners as such cannot claim.*] Where an execution for a partnership debt is levied on partnership property, either party may never his share and claim an exemption therein; but the partnership as such, or the parties jointly, can claim no exemption. *Russell v. Lennon* (Wis.), 60.
2. —.] The members of an insolvent firm are not entitled to the statutory exemptions out of the partnership property after it has been seized in execution by partnership creditors, notwithstanding all the members join in demanding the exemptions. *Gaylord v. Imhoff* (Ohio), 762.
3. *Capital stock—loss—contribution.*] Articles of copartnership between A, B, C, and D, for the transaction of a commission business, provided that A and B should contribute the whole capital in unequal proportions; that A should contribute "such time as he may be able to give;" that B, C, and D, should each contribute all their time to the business; that each partner should receive one-fourth of the net profits; and that A and B should receive interest on the capital contributed by them. The partnership was afterward dissolved by mutual consent, the business of the firm closed by B, and it resulted in a loss. *Held*, on a bill in equity by B against the other partners, that the capital constituted a debt of the partnership to which all the partners were bound to contribute equally, and that, one of them being insolvent, the loss was to be borne equally by the other three. *Whitcomb v. Converse* (Mass.), 311.
4. *Effect of payment by one partner after dissolution, on statute of limitation.*] Payment of interest on a note drawn by a firm, by one of the members,

after the dissolution of the firm, but within six years after the maturity of such note, will renew it, as against the statute of limitations; nor will the fact that one of the firm is a married woman alter the effect of such renewal. *Merritt v. Day* (N. J.), 362.

Sale of one partner to the firm is not an alienation.] See INSURANCE, 563

PAUPERS.

Unlawful commitment to work-house.] See CONSTITUTIONAL LAW 661

PAYMENT.

1. *When obligations extinguished by — subrogation.*] S. advanced money to a railway company to enable it to pay its past due coupons under an agreement that he should hold the coupons thus paid as security. The property of the railway was afterward sold under the mortgage given to secure the bonds and coupons, and the proceeds being less than the indebtedness, S., as holder of such coupons, claimed a *pro rata* share with the holders of other bonds and coupons. *Held*, that as the bondholders were ignorant of the arrangement between S. and the company, the coupons when paid became, as to them, extinguished, and that S. was not entitled to share. *Union Trust Co. v. Monticello, etc., R. R. Co.* (N. Y.), 541.

2. *To the administrator of a living person.*] A payment by a debtor to an administrator duly appointed is valid, and a bar to an action to compel a second payment, although the supposed intestate is alive at the time and letters of administration are subsequently revoked for this reason. *Roderigas v. East River Saving Institution* (N. Y.), 555.

POLICE POWER.

See CONSTITUTIONAL LAW, 12.

PREFERENCE.

See BANKRUPTCY, 438.

PRESCRIPTION.

See MUNICIPAL CORPORATION, 248; NUISANCE, 567.

PRINCIPAL AND AGENT.

Liability of agent to principal for damages caused by unauthorized acts.] See ACTION, 241.

PRIZE FIGHT.

See ASSAULT AND BATTERY.

PROBATE COURTS.

See COURTS, 555

PROMISE.

See CONTRACT, 347.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS

PUBLIC CHARITY.

See TRUST.

PUBLIC POLICY.

See ILLEGAL CONTRACT, 681; MARRIAGE, 388.

RAILROAD.

1. *Constitutional law — making railroad companies liable for coroner's inquest.*] A statute made railroad companies liable "for all expenses of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision or other accident occurring to such cars, or otherwise." *Held*, unconstitutional so far as it attempts to make railroad companies liable in cases where they have violated no law or been guilty of no negligence. *Ohio and Mississippi Railway Co. v. Lackey* (Ill.), 259.
2. *Statute requiring to fence line.*] A statute requiring a railroad company to fence its lines is a police regulation, and obligatory upon all railroads whether chartered before or after its passage. *Wilder v. Maine Central R. R. Co.* (Me.), 698.
3. *Negligent communication of fire.*] A railroad company is bound to keep its track and contiguous land clear of materials likely to be ignited from sparks issuing from its locomotive properly constructed and driven. *Satmon v. Delaware, etc., R. R. Co.* (N. J.), 357, and *note*, 362.
4. *Contributory negligence.*] A person owning land contiguous to a railroad is not obliged to keep the leaves falling from his trees, from being carried by the wind to such railroad; nor to keep his lands clear of leaves and combustible matter; nor, on failure to perform such acts, does he become contributory to the production of a fire originating in the carelessness, on its own land, of the railroad company. *Ib.*

Damages for lands condemned for.] *See* DAMAGES, 220.*How affected by changes in general laws.*] *See* CONSTITUTIONAL LAW, 592.*Injury to animal through failure to fence.*] *See* NEGLIGENCE.*Injury to employee.*] *See* MASTER AND SERVANT, 552.*Liability of assignee of, for injuries occasioned in operating.*] *See* NEGLIGENCE, 533.

RECEIVER.

Liability of, for negligence of servant in the affairs of the estate.] *See* NEGLIGENCE, 533.

REGISTRY.

Of deed, when not notice.] *See* DEED, 737.*See* ELECTION LAW, 431.

REMEDIAL LEGISLATION.

See DEED, 76.

REMOVAL OF CAUSES.

1. *When may be had.*] An action by the citizen of a State against a foreign corporation cannot be removed into the United States Circuit Court under the Revised Statutes after one trial has been had, although the action is one where review will lie. *Whittier v. Hartford Ins. Co.* (N. H.), 185.
2. *Residence of parties.*] A citizen of New Hampshire brought action against a Vermont corporation, and afterward, in good faith, moved to and became a citizen of Vermont. Afterward the defendant petitioned for a removal of the cause to the United States Circuit Court. *Held*, that both parties being citizens of the same State at the time of the petition, the removal could not be had. *Leird v. Conn. & Pass. Rivers R. R.* (N. H.), 215.

REPUTATION.

Evidence of.] See EVIDENCE, 325.

ROBBERY.

See CRIMINAL LAW, 536.

SABBATH.

See SUNDAY.

SALE.

1. *Of standing timber — license to enter and remove.*] The owner of land conveyed the timber standing and lying thereon, with license to the grantee to enter and remove the same. *Held*, that the grantee might enter within a reasonable time, but that if he did so afterward he was liable in trespass *quare clausum* for the entry, but not for the value of the trees. *Holt v. Stratton Mills* (N. H.), 119.
2. *Of exempt property — may be fraudulent as to creditors — homestead.*] J. S. owning premises which were exempt from execution as a homestead, conveyed them to plaintiff by a deed which was fraudulent and void as to creditors; but J. S. continued to occupy them. The premises were afterward sold under an execution against J. S., and defendant derived title through such sale. *Held*, (1) that the right to a homestead was not assignable, and therefore, that whatever rights J. S. might have had, the plaintiff could not avail himself of them; and (2) that the conveyance might be fraudulent and void as to creditors although the property was exempt from levy. *Currier v. Sutherland* (N. H.), 148, and *note*, 150.
3. *Representations as to vegetable seeds — implied warranty.*] A statement made in good faith at the time of sale, by the vendor, that seed is of a certain kind, such seed, with respect to kind, not being ascertainable by inspection, will lay a ground from which a jury, or a court having power to pass upon facts, may infer a warranty as to kind. *Wolcott v. Mount* (N. J.), 425, and *note*, 430.
4. *Measure of damages.*] Where seed are warranted as to kind, and the vendor knows the use to be made of the seed, he is answerable for the difference

between the value of the product of the seed sold, it being put to the use specified, and the value of the product that would have resulted had the seed corresponded to the warranty. *Ib.*

SERVICE.

By officer de facto.] See OFFICER, 835.

On foreign corporation.] See CORPORATION, 518.

SEWERS.

See MUNICIPAL CORPORATIONS, 622, and note, 626.

SHIPPING.

Collision — liability of general owner.] The general owners of a vessel are not liable for damages occasioned by a collision, happening through the fault or negligence of the master of the vessel who controls her *pro hac vice* and is sailing her "on shares." *Somes v. White* (Me.), 718.

STANDING TIMBER.

Sale of.] See SALE, 119.

STATUTES.

- 1 *Presumption as to formalities of enactment.*] Where an act has been duly authenticated, and published as law by authority, the presumption is, that all the constitutional solemnities and prerequisites necessary to its valid enactment have been complied with; and this presumption exists until the contrary is clearly made to appear. But when it can be made clearly to appear that the particular bill, or section of a bill, although it may have all the forms of authentication, has never in fact received the legislative assent, the court is bound to look not only behind the printed statute book, but beyond the forms of authentication of the bill as recorded in the office of the Court of Appeals, and if the evidence be clear and entirely satisfactory to the mind of the court, to decide accordingly. *Berry v. The Baltimore, etc., R. R. Co.* (Md.), 69.
2. *Parol evidence to impeach.*] A statute having the proper forms of authentication cannot be impeached or questioned upon mere parol evidence. *Ib.*
3. *Journals as evidence.*] The journals of the two houses of the legislature, in connection with other competent evidence upon the subject, may be examined as means of information to aid in arriving at a correct conclusion as to what was the action of the legislature on any particular bill before it. *Ib.*
4. *Statute good in part and void in part.*] Statutes may be good in part and void in part, and if the part that is valid be entirely distinct and severable from that which is void, the former will be upheld and enforced as if passed disconnected from the latter. *Ib.*

See CONSTITUTIONAL LAW.

STATUTE OF FRAUDS.

When contracts are void as not to be performed within a year.] An agreement to render services, to be paid for after the employer's death, is not within

the statute as an agreement not to be performed within a year. *Kent v. Kent* (N. Y.), 502.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS, 181

STOCK.

Forged assignment of — right of purchaser.] Plaintiff took in the regular course of business an assignment of stock in the defendant's insurance company as security for a loan; presented the certificates to the company and received new certificates in lieu thereof. The assignment turned out to be a forgery. *Held*, that the plaintiff and not the insurance company must sustain the loss. *Brown v. Howard Fire Ins. Co.* (Md.), 90.

SUBROGATION.

See PAYMENT, 541

SUNDAY.

1. *Note made on — estoppel of maker.*] The maker of a promissory note bearing date on a secular day is estopped, as against a *bona fide* holder for value, to show that it was made on Sunday. *Knox v. Clifford* (Wis.), 28.
2. *Travel on — injury from defective way.*] A person walked about a mile, in a town, on Sunday for exercise. *Held*, not a traveler in such a sense as to bar her recovery against the town for injuries suffered during such walk from a defect in the highway. *O'Connell v. City of Lewiston* (Me.), 673

SUPPORT OF SOIL.

Of land adjoining street.] *See* MUNICIPAL CORPORATION, 243.

SURETY.

1. *On official bond — liability for moneys received in former term.*] A town officer, at the expiration of his term of office, made a report showing the amount of money in his hands belonging to the town, and the report was approved by the town. He was reelected, and gave a new bond with new sureties. *Held*, that the latter were liable on his failure to account at the end of his second term for the money so reported at the end of his first term. *Morley v. Town of Metamora* (Ill.), 266.
2. *On a statutory undertaking — discharge of liability on death of surety.*] An undertaking given upon appeal in an action read thus: "We," . . . (naming sureties) "do hereby, pursuant to the statute in such case made and provided, undertake, etc." *Held*, (1) that the obligation was joint and not several; (2) that upon the death of one of the sureties his estate was discharged from liability thereon both in law and in equity; and (3) that the liability of the parties was not affected by the fact that the undertaking was given in pursuance of a statute. *Wood v. Fisk* (N. Y.), 528.
3. *When death of, does not discharge estate.*] The obligors in a bond — one of whom was a surety only — bound themselves, their "heirs, executors and administrators." The surety died, and after his death a breach occurred. *Held*, that his estate was liable. *Royal Ins. Co. v. Davies* (Iowa), 581

On bail bond.] See BAIL, 389.

When liability continues after discharge of principal.] See BANKRUPTCY, 157

SURRENDER.

Of principal by bail.] See BAIL, 389.

SURROGATE COURTS.

See COURTS, 555.

TAXES.

1. *Assessment when not an incumbrance—breach of covenant.]* By statute assessors of taxes were required to assess lands and to deliver the completed assessment roll to the board of supervisors, who inserted the amount of tax and delivered the roll with their warrant to the collector. Defendant conveyed land with covenants against incumbrances, after it had been so assessed by the assessors, but before the supervisors had extended the tax. *Held*, that the assessment did not constitute an incumbrance. *Barlow v. Saint Nicholas National Bank* (N. Y.), 547.

2. *Equity will not restrain collection of.]* Equity has no jurisdiction to restrain the collection of a personal tax, even if it be illegal; nor will it assume jurisdiction to prevent a multiplicity of suits when the parties have, severally, remedies at law. *Youngblood v. Sexton* (Mich.), 655.

3. *Recovering back after assessment has been set aside.]* Where an assessment has been set aside by a court, one who has paid it, though voluntarily may recover it back. *Mayor ads. Riker* (N. J.), 386.

In violation of contract.] See CONSTITUTIONAL LAW, 283.

On liquor traffic—tax is not "license."] See CONSTITUTIONAL LAW.

Rule as to uniformity.] See CONSTITUTIONAL LAW, 12.

See ASSESSMENTS.

TELEGRAPH.

Error in market-report—presumption of negligence—damages.] Defendant, a telegraph company, agreed to furnish plaintiff, a grain dealer at S., with daily reports of the grain market at C., a point beyond defendant's line. By reason of an error in the report, plaintiff was induced to purchase a quantity of grain to fill a contract for future delivery. *Held*, (1) that in the absence of evidence it would be presumed that the report was correctly delivered to defendant at the point where its own line commenced; (2) that in the absence of evidence it would be presumed that the error occurred through defendant's negligence, and (3) that the measure of damages was the difference between the actual purchase price and the price as represented in the report. *Turner v. Hawkeys Telegraph Co.* (Iowa), 605.

TENANTS-IN-COMMON.

Purchase by one tenant at tax sale.] Where one tenant-in-common purchases the land held by himself and his co-tenants, at a tax sale, he will be regarded as holding the title in trust for his co-tenants unless they refuse to contribute. *Weare v. Van Meter* (Iowa), 616.

TIMBER.

Sale of standing.] See **SALE**, 119.

TOWN.

Liability of, for defects in ways.] See **HIGHWAY**, 18.

Liability to adjacent land-owner for non-repair of highway.] See **HIGHWAY**.

TRADE-MARKS.

Individual names as trade-marks.] Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do any act calculated to mislead. *Monesty v. Monesty* (N. Y.), 469.

TRANSFER OF CAUSE.

See **REMOVAL OF CAUSE**.

TRAVELER.

See **SUNDAY**, 678.

TREASURER.

Of county, relation of to county.] See **COUNTY TREASURER**, 638.

TRESPASS.

Of officer in execution of process—liability of suitor for. Attorney when client not bound by acts of.] In an action of trespass for a wrongful seizure of plaintiff's goods made by an officer under a warrant issued against the goods of another at the suit of defendant, *held*, (1) that the defendant was not liable for the wrongful acts of the officer, without proof that he had authorized such acts; and (2) that the fact that defendant's attorney had directed such wrongful acts would not render the defendant liable in the absence of proof of special authority in the attorney. *Welsh v. Cochran* (N. Y.), 519.

TRIAL.

By jury, right to compulsory reference.] See **CONSTITUTIONAL LAW**, 194.

TRUST.

1. *Public charity.*] A gift for the erection of a house for public worship, or for the use of the ministry, may constitute a public charity if there is no definite body for whose use the gift was intended, capable of receiving, holding and using it in the manner intended. But where there is a body, or a definite number of persons, ascertained or ascertainable, clearly pointed out by the terms of the gift to receive, control and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone. *Old South Society v. Orenster* (Mass.), 299.

2. *Sale of trust property — when will be authorized.*] Land was conveyed to certain persons named "and to such as they shall associate to themselves, their heirs and successors forever, for the erection of a house for their assembling themselves together publicly to worship God, as also the erection of a dwelling-house for such minister or ministers as shall be by them and their successors from time to time orderly and regularly admitted for the pastor or teacher to the said church or assembly," "and for no other intent, use or purpose whatsoever." *Held*, (1) not to constitute a public charity; (2) that the land so conveyed might be sold by authority of the legislature or of a court of equity; and (3) on an application for a sale of the property, that the vote of a majority of the pew-holders or members of the society was not of itself a sufficient authority to enable the corporation to make the sale, nor a sufficient reason to justify the court in authorizing it to be made; but that those seeking the sale must satisfy the court that it was reasonably required for the accommodation of the society as a whole, and that the proposed change would not subject the minority to an unreasonable sacrifice of interest or convenience, or in any way work injustice to them. *Id.*

ULTRA VIRES.

See CORPORATION; NATIONAL BANK, 66.

UNDERTAKING.

Liability of surety on.] *See* SURETY, 528.

USAGE.

See BROKER, 66; CUSTOM.

USURY.

Who may set up defense of.] Where one purchases land subject to a mortgage lien, and, as a part of the consideration, agrees to pay the mortgage debt, he cannot defend against the mortgage on the ground of usury. *Cramer v. Lepper* (Ohio), 756, and *note*, 758.

See NATIONAL BANK, 759.

VAGRANT.

Unlawful commitment to work-house.] *See* CONSTITUTIONAL LAW, 681.

VERDICT.

Affidavits of jurors admissible to correct.] The foreman of a jury by mistake announced a verdict different from that agreed to by the jury, and the verdict was so recorded. *Held*, that affidavits of the jurors were competent evidence to prove the mistake. *Dalrymple v. Williams* (N. Y.), 514.

Indictment sustained after.] *See* INDICTMENT, 724.

Right of jury to give general or special.] *See* CONSTITUTIONAL LAW, 683.

WAIVER.

Of condition in policy.] See INSURANCE, 35.

WARRANTY.

Implied, on sale of vegetable seeds.] See SALE, 435.

Of title, breach of.] See COVENANT OF TITLE, 341.

WILL.

1. *Wife not "relation" of husband.] A wife is not a relation of her "husband" within a statute saving from lapse a devise to a "child or other relation" of the testator's who dies before the testator. Cleaver v. Cleaver (Wis.), 30.*
2. *Party receiving legacy estopped from contesting.] One who receives a legacy under a will is estopped from contesting the validity of the will, without repaying the amount of the legacy or bringing the money into court. Holt v. Rics (N. H.), 188.*

WITNESS.

Defendant in criminal prosecution as witness in his own behalf—extent of examination.] The defendant in a criminal prosecution became a witness at his own request. Held, (1) that he thereby waived the constitutional provision that an accused person shall not be compelled to give evidence against himself; (2) that he could not refuse to answer questions put on cross-examination to discredit his direct evidence on the ground that answering would criminate himself; and (3) that privilege from answering questions on the ground that they tend to criminate the witness is the privilege of the witness, and not of his counsel. State v. Wentworth (Me.), 688.

WOMEN.

Not entitled to admission to the bar.] See ATTORNEY, 43.

See MARRIED WOMEN.

WORDS.

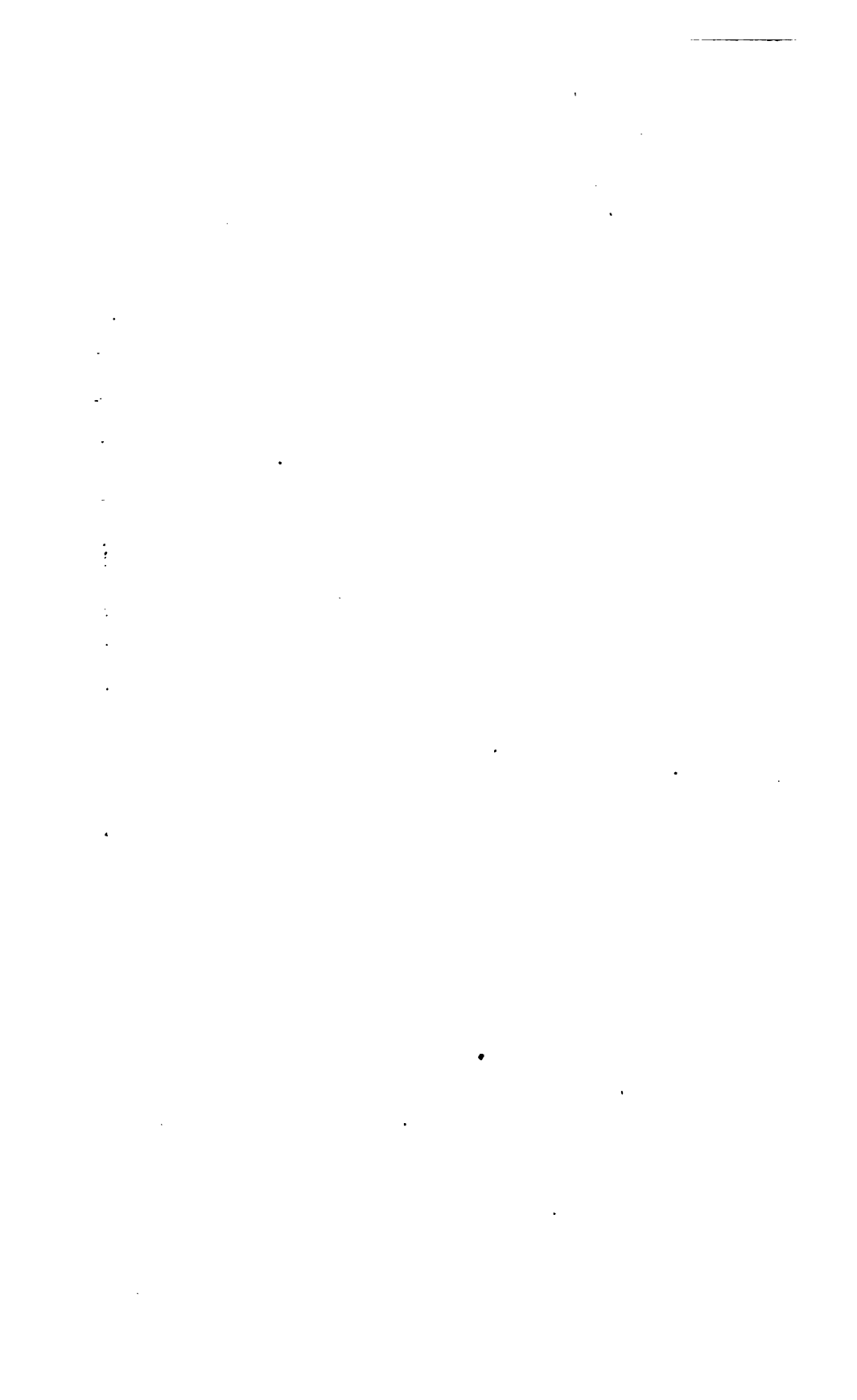
"Carrying to sell."] See CONSTITUTIONAL LAW, 12.

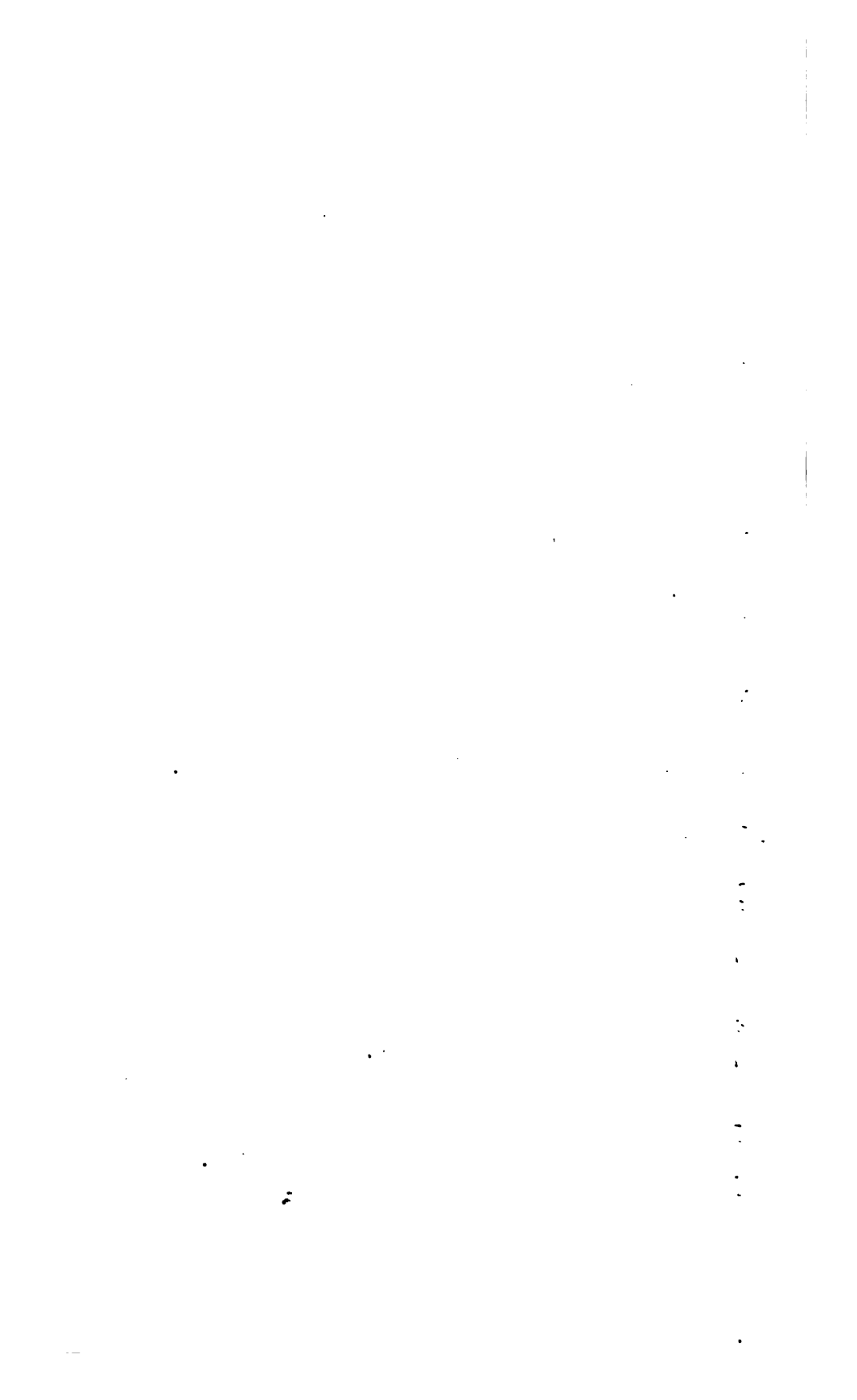
"Coram non judice."] See CONSTITUTIONAL LAW, 50.

"Relation."] See WILL, 30.

"State tax."] See CONSTITUTIONAL LAW, 655.

"Traveler."] See SUNDAY, 673.







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